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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. UTTECHT,

Petitioner,

v.

CAL COBURN BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Cal Coburn Brown, *Petitioner-Appellant,* v. JOHN LAMBERT, Superintendent of Washington State Penitentiary, *Respondent-Appellee.*	No. 04-35998 D.C. No. CV-01-00715-JCC ORDER AND AMENDED OPINION

Appeal from the United States District Court for the Western District of Washington, John C. Coughenour, Chief Judge, Presiding

Argued and Submitted

July 14, 2005 – Pasadena, California

Filed December 8, 2005

Amended June 19, 2006

Before Stephen Reinhardt, Alex Kozinski and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Kozinski; Dissent from Denial of Rehearing En Banc by Judge Tallman

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SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court in part and remanded. The court

held that excusing for cause in a capital case a juror who stated unequivocally that he could consider the death penalty as an opinion if told to do so was directly contrary to Supreme Court precedent, as was the Washington Supreme Court's decision to uphold the juror strike on direct appeal.

Appellant Cal Brown confessed to both the rape and attempted murder of a woman in California, and the rape and murder of another woman in Washington. After pleading guilty in California and receiving a sentence of life imprisonment, Brown was tried in Washington in 1993. The trial judge excused juror X for cause based on her statement that she did not think that she could impose the death penalty. The judge also excused juror Y for cause, based on her strong opposition to the death penalty. Finally, the judge excused juror Z for cause, although he said that he believed in the death penalty and stated unequivocally that he could consider the death penalty as an option if told to do so. The jury convicted Brown of aggravated first-degree murder, and sentenced him to death. Brown exhausted his direct appeals, and state habeas proceedings. The Washington Supreme Court, in upholding the trial judge's decision to excuse jurors X, Y, and Z for cause, noted that Brown did not object at trial to the state's challenge of juror Z for cause; and that juror Z had made an incorrect statement of the law and misunderstood the state's burden of proof to be beyond a shadow of a doubt, although he was corrected later. Brown petitioned for a writ of habeas corpus in federal district court, raising an umber of constitutional claims regarding his trial and sentencing. The district court denied his

petition after an evidentiary hearing.

Brown appealed, challenging the constitutionality of the Washington death penalty statute on its face, arguing that it gives the jury no guidance on how to consider evidence of collateral crimes. Brown also argued that the three prospective jurors were erroneously dismissed for cause.

[1] The Washington death penalty statute requires the jury to deliberate on one question only: Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency? The Ninth Circuit has previously upheld the facial validity of the identical Washington statute against a challenge that it failed to adequately channel and guide jury sentencing discretion. **[2]** This holding necessarily precluded Brown's claim.

[3] Based on her response, the trial judge properly excused X for cause. **[4]** The trial judge properly excused juror Y for cause as well.

[5] The Supreme Court has explained that the standard for determining whether prospective jurors may be excluded for cause based on their views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. **[6]** It is-and was at the time of Brown's trial in 1993-clearly established that excusing a juror for cause in a capital case is unconstitutional, absent evidence that the juror would not follow the law. **[7]** Nowhere did the Washington Supreme Court find that juror Z

would be unable to follow instructions. Nor could the court have found this. Juror Z ultimately stated that he could consider the death penalty in an appropriate case. Had there been a finding that juror Z was substantially impaired in his ability to follow the law, it would have been unreasonable. **[8]** The reasons that the court did give for upholding Z's exclusion was misplaced and insufficient. **[9]** Juror Z's temporary misunderstanding of the prosecution's burden of proof was also irrelevant; it would have been easily corrected by the jury instructions, which juror Z gave every indication he would follow. **[10]** Finally, Brown's failure to object to juror Z's removal at trial did not alter the error analysis. Brown raised the juror Z claim on direct appeal, and the Washington Supreme Court did not find the claim to be waived or procedurally barred. Nor did the state allege that the claim was waived or barred, or that it was not exhausted in state court. **[11]** In sum, excusing juror Z for cause was directly contrary to Supreme Court precedent, as was the Washington Supreme Court's decision to uphold the juror strike on direct appeal.

[12] Having found that juror Z was erroneously excluded, it was unnecessary for Brown to demonstrate he was prejudiced by Z's exclusion. Prejudice is presumed. Thus, Brown's death sentence could not stand. The judgment of the district court had to be reversed.

COUNSEL

Suzanne Elliott and Gilbert H. Levy, Seattle, Washington, for the petitioner-appellant.

Rob McKenna, Attorney General, and John J.

Samson, Assistant Attorney General, Criminal Justice Division, Olympia, Washington, for the respondent-appellee.

ORDER

The opinion filed December 8, 2005, and reported at 431 F.3d 661, is withdrawn, and is replaced by the Amended Opinion, 04-35998, filed concurrently herewith. The petition for rehearing is otherwise denied.

A judge requested a vote on whether to rehear this case en banc, but a majority of the non-recused active judges did not vote in favor of en banc consideration. The petition for rehearing en banc is therefore **DENIED**. *See* Fed. R. App. P. 35. No further petitions for rehearing or rehearing en banc will be accepted.

OPINION

KOZINSKI, Circuit Judge:

We consider the exclusion of jurors for cause in a death penalty case.

Facts[1]

Cal Brown is not a nice man. In May 1991, he carjacked Holly Washa and drove her to a motel near the Seattle-Tacoma airport. Brown robbed, raped and tortured Washa while holding her hostage for two days. He bound and gagged her, penetrated her

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[1] For a more detailed discussion of the facts, see the Washington Supreme Court's opinion in Brown's direct appeal, *State v. Brown*, 940 P.2d 546, 555-59 (Wash. 1997) (en banc).

with foreign objects, whipped her and shocked her with an electrical cord. Eventually, Brown put Washa in the trunk of her car, slit her throat, stabbed her and left her to bleed to death in a parking lot.

Brown then flew to Palm Springs, California, to rendezvous with his next victim, Susan Schnell, whom he had met on an airplane a few days earlier. While inside their hotel room, Brown similarly robbed and raped Schnell, bound and gagged her, tortured and penetrated her. After handcuffing Schnell to the bed, Brown slit her throat and left her to die. Amazingly, Schnell was able to call the front desk and summon the police, who arrived and arrested Brown in the hotel parking lot.

Brown quickly confessed to both the rape and attempted murder of Schnell in California, and the rape and murder of Washa in Washington. After pleading guilty in California and receiving a sentence of life imprisonment, Brown was tried in Washington. A jury convicted Brown of aggravated first-degree murder, and sentenced him to death. Brown exhausted his direct appeals and state habeas proceedings. He then petitioned for a writ of habeas corpus in federal court, raising a number of constitutional claims regarding his trial and sentencing.[2] The district court denied his petition after an evidentiary hearing, and Brown appeals

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[2] Because Brown filed his habeas petition after April 23, 1996, we apply the "substantive review standards of the Antiterrorism and Effective Death Penalty Act of 1996. Pub. L. No. 104-132, 110 Stat. 1214 (1996) ('AEDPA')." *Webster v. Woodford*, 369 F.3d 1062, 1066 (9th Cir.), *cert. denied*, 543 U.S. 1007 (2004); *see also Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

three issues relating to his death sentence.[3]

Facial Validity of Washington's Death Penalty Statute

Brown challenges the constitutionality of the Washington death penalty statute on its face, arguing that it gives the jury no guidance on how to consider evidence of collateral crimes.

[1] The Washington death penalty statute requires the jury to deliberate on one question only: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" Wash. Rev. Code § 10.95.060(4); *see also id.* § 10.95.070 (setting forth a non-exhaustive list of factors the jury may consider). We have previously upheld the facial validity of the identical Washington statute against a challenge that it "fails to adequately channel and guide jury sentencing discretion." *Campbell v. Kincheloe*, 829 F.2d 1453, 1464 (9th Cir. 1987) ("*Campbell I*"). In *Campbell I*, we viewed the statute in light of the construction given to it by the Washington Supreme Court, *see State v. Bartholomew*, 683 P.2d 1079, 1086-87 (Wash. 1984) (en banc), and held that the defendant's facial

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[3] In his "Statement of Issues," Brown also asks whether his "*conviction* [was] obtained in violation of the Due Process Clause of the Fourteenth Amendment. . . ." (Emphasis added.) But the claims Brown raises in the remainder of his brief relate only to his death sentence, not his conviction. Thus, we will consider only whether Brown is entitled to habeas relief with respect to his death sentence. *See Am. Int'l Enters. V. FDIC*, 3 F.3d 1263, 1266 n.5 (9th Cir. 1993) (holding that an issue mentioned in a statement of issues, but not addressed in the argument section of the brief, may be considered abandoned).

challenge was "meritless." *See Campbell I*, 829 F.2d at 1464; *see also Campbell v. Blodgett*, 978 F.2d 1502, 1513-14 (9th Cir. 1992) (per curiam) ("*Campbell II*").

[2] Brown's argument in this case is merely a subset of Campbell's facial challenge; he claims that the statute fails to adequately channel and guide jury sentencing discretion *with respect to evidence of collateral convictions*. Thus, our broader holding in *Campbell I*-that the Washington statute does not fail to adequately guide jury discretion with respect to *anything*-necessarily precludes Brown's claim. We have no occasion to reevaluate our earlier assessment of the statute. *See Barapind v. Enomoto*, 400 F.3d 744, 750-51 (9th Cir. 2005) (en banc) (per curiam) (noting that rulings by three-judge panels are "law of the circuit," and are binding on subsequent three-judge panels).

Jury Selection

Brown next argues that three prospective jurors were erroneously dismissed for cause, and that he was therefore sentenced by a "tribunal organized to return a verdict of death." *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968).

[3] 1. Juror X was uncertain whether she would be able to impose the death penalty. Though she initially professed a willingness to follow the court's instructions, she later expressed serious reservations: "Oh, yeah, I could follow the instructions. I think that-actually making that decision, no." When the court asked her about her ability to vote for death, she responded, "I don't think I could. It would have to be so crystal clear. I would have to be-." Based on these responses, the trial

judge properly excused X for cause, finding that her views on the death penalty would "substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and oath." *Wainwright v. Witt,* 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas,* 448 U.S. 38, 45 (1980)) (internal quotation mark omitted).

[4] Juror Y's voir dire exposed even stronger antipathy toward the death penalty, bordering on moral outrage. She described the death penalty as "barbaric" and suggested that it "makes . . . brutes of us all." She expressed resentment toward the state of Washington for putting her in the position of choosing between life and death. Finally, when asked by the court if she would be able to consider sentencing anyone to death, Y "crossed her arms, held her hand up . . . and sat back."[4] The trial judge properly excused juror Y for cause as well, noting that her impairment was "obvious."

The voir dire examinations of jurors X and Y contrast sharply with the examination of juror Z. Z expressed no antipathy toward the death penalty; to the contrary, he stated that he "believe[d] in the death penalty." In explaining his views, Z outlined a

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[4] It is unclear from the record how Y "held her hand up." Presumably, she was holding her hand up with her palm out, in a motion often associated with the exclamation, "Talk to the hand (because the ears ain't listening)," phrase later popularized by Fran Drescher in the mover *Beautician and the Beast. See Terms of the 90s, Slange of the Nineties,* http://www.inthe90s.com/generated/terms.shtml (defining "Talk to the Hand" as "[a]nother way of saying 'I don't want to hear what you are saying.'"); *see also* Lynn Truss, *Talk to the Hand: The Utter Bloody Rudeness of the World Today* or *Six Good Reasons to Stay Home and Bolt the Door* (2005).

balanced and thoughtful position. For example, Z was discomfited by an earlier era in which "[i]t seemed like . . . [the death penalty] wasn't used at all," because he believed "there [a]re times when it would be appropriate [to impose the death penalty]." But he expressed caution that the death penalty be reserved for "severe situations": "I don't think it should never happen, and I don't think it should happen 10 times a week either." Z felt most comfortable imposing the death penalty where the defendant is "incorrigible and would reviolate if released," and less comfortable where the defendant is found to have been "temporarily insane." But he stated unequivocally that he could consider the death penalty as an option if told to do so.[5]

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[5] In fact, during the course of his voir dire, juror Z stated *six times* that he could follow the law and impose the death penalty, while not *once* stating that he might not be able to:

Q. Do you think that you could consider [the death penalty]?

A. Yes, I could.

. . . .

Q. [D]oes that mean what I'm hearing you say is that you could consider [the death penalty]?

A. I believe so, yes.

. . . .

Q. You would be willing to follow the law?

A. Yes.

. . . .

Q. [D]o you thin . . . you could impose [the death penalty]?

A. Yes, sir.

In essence, Z's views on whether to impose the death penalty mirrored Washington's death penalty statute itself: He believed a defendant should be put to death where his crime was appropriately severe but not otherwise, and was willing to take into account mitigating factors (mental health issues, for example), aggravating factors (likelihood of recidivism, for example) and the particular circumstances of the instant murder. *See* Wash. Rev. Code §§ 10.95.060, 10.95.070. Additionally, he was open to considering other types of mitigating circumstances, such as "somebody's childhood" or "emotional development," was welcoming of his fellow jurors' views, and was accepting of the heavy responsibility assigned to jurors by the state. Most importantly, he promised he would "follow the law" without reservation.

Despite these assurances, the prosecutor protested that Z was too reluctant to impose the death penalty, and that he would only vote for death if convinced that the defendant would "kill again." The prosecutor thus moved to excuse juror Z for cause, and the trial judge granted the motion without further inquiry.

[5] **2.** In 1985, and again in 1987, the Supreme Court explained that the "standard for

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. . . .

Q. [D]o you think you could also consider and vote for the death penalty under those circumstances?

A. I could consider it, yes.

Q. Then could you impose it?

A. I could if I was convinced that was the appropriate measure.

determining whether prospective jurors may be excluded for cause based on their views on capital punishment . . . is 'whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."'" *Gray v. Mississippi*, 481 U.S. 648, 658 (1987) (quoting *Witt*, 469 U.S. at 424, (quoting *Adams*, 448 U.S. at 45)). The Supreme Court insisted that capital jurors not be struck for cause unless they are unable to follow the court's instructions. Even jurors "who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Id.* (quoting *Lockhart v. McCree*, 476 U.S. 162, 176 (1986) (Rehnquist, J.)).

[6] Further, the Supreme Court significantly circumscribed the state courts' role in excusing jurors for cause in capital cases: It held that

> [t]he State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It "stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law."

Id. at 658-59 (alterations in original) (citation

omitted) (quoting *Witt,* 469 U.S. at 423, and *Witherspoon,* 391 U.S. at 523). Thus, it is-and was at the time of Brown's trial in 1993-clearly established that excusing a juror for cause in a capital case is unconstitutional, absent evidence that the juror would not follow the law.

[7] When the Washington Supreme Court upheld the trial judge's decision to excuse jurors X, Y and Z for cause, it found that both X and Y were "substantially impaired" in their ability to perform their duties as jurors. *Brown,* 940 P.2d at 585. Those findings are adequately supported by the record. But a similar finding is missing from the state court's discussion of juror Z. The court's entire review of Z's exclusion from the jury is as follows:

> Appellant did not object at trial to the State's challenge of [Z] for cause. At any rate, [Z] was properly excused. On *voir dire* he indicated he would impose the death penalty where the defendant "would reviolate if released," which is not a correct statement of the law. He also misunderstood the State's burden of proof in a criminal case and understood it to be "beyond a shadow of a doubt," although he was corrected later. The trial court did not abuse its discretion in excusing [Z] for cause.

Id. Nowhere did the court find that Z would be unable to follow instructions. Nor *could* the court have found this: Just like the juror at issue in *Gray,* juror Z "ultimately stated that [he] could consider the death penalty in an appropriate case." *Gray,* 481 U.S. at 653.[6] Had there been a finding that Z was

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[6] The dissent from denial of rehearing en banc agrees that the juror in *Gray* was improperly struck because she

"substantially impaired" in his ability to follow the law, it would have been unreasonable. *See* 28 U.S.C. §§ 2254(d)(2), (e)(1).[7]

[8] The reasons that the court *did* give for upholding Z's exclusion are misplaced and insufficient. Z's statement that he would impose the death penalty where the defendant would be likely to kill again did not exclude the possibility that Z would vote to impose the death penalty in other circumstances as well.[8] And the fact that Z

"stated unequivocally that she could impose the death penalty without demurrer." Dissent at 6757. In fact, juror Z's commitment to following instructions was far stronger than the juror improperly struck in *Gray*. When Z was asked if he could impose the death penalty, he responded with an unequivocal, "Yes, sir." When the juror in *Gray* was asked if she could vote for the death penalty, she responded only, "I think I could." *Gray*, 481 U.S. at 653 n.5.

[7] The dissent from denial also makes much of juror Z's indecisiveness, a term it uses repeatedly. According to the dissent, this indecisiveness connoted an "inability to properly follow the court's instructions and apply the law." Dissent at 6761. The state has never suggested this novel theory and we do not find it persuasive. If the juror in *Gray* was fit to serve despite her moral scruples against the death penalty, we see no basis for finding juror Z impaired because of his alleged "indecisiveness." Indeed, keeping an open mind as to whether the death penalty is appropriate, before any evidence has even been presented, strikes us as a virtue in a juror, not a basis for disqualification.

[8] Even after learning that life without parole was an alternative to the death penalty, Z unequivocally stated that he would be able to consider and impose the death penalty. The dissent from denial makes the following incorrect statement: "Although both defense and the prosecutor explained to him more than once during their voir dire questioning to qualify Juror Z that, if found guilty, Brown would never be released from prison, Juror Z's answers concerning his willingness to

impose death in conformance with Washington law were nonetheless confused." Dissent at 6759. Putting aside the fact that being "confused" is hardly the same as being unwilling to follow the court's instructions, juror Z in fact stated unequivocally and repeatedly that he could impose the death penalty. Rather than "[q]oting selective portions of [the] voir dire transcript," *id.* at 6762, as the dissent does, *see id.* at 6759-60 n.2, we provide the entire relevant transcript of the defense's voir dire:

Q. Were you aware before that Washington has got this kind of sentence where it's life without parole where you are not ever eligible for parole?

A. I did not until this afternoon.

Q. That is the two options that the jury has if they found the person guilty of premeditated murder beyond a reasonable doubt plus aggravating circumstances beyond a reasonable doubt. Do you think that you could consider both options?

A. *Yes, I could.*

Q. Could you give me an idea sort of [how] you thought about sort of the underlying reason why you think the death penalty is appropriate, what purpose it serves, that kind of thing?

A. I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate.

Q. Okay. Now, knowing that you didn't know before when you were coming to those opinions about the two options that we have here obviously somebody who is not going to get out of jail no matter which sentence you give them if you got to that point of making a decision about the sentence, does that mean what I'm hearing you say is that you could consider either alternative?

A. *I believe so, yes.*

And here is the prosecutor's voir dire on this subject:

[Q.] I guess the reverse side of what you're saying is, if you could be convinced that he wouldn't kill again, would you

find it difficult to vote for the death penalty given a situation where he couldn't kill again?

A. I think I made that statement more under [the] assumption that a person could be paroled. And it wasn't until today that I became aware that we had a life without parole in the state of Washington.

Q. And now that you know there is such a thing and they do mean what they say, can you think of a time when you would be willing impose a death penalty since the person would be locked up for the rest of his life?

A. I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole.

Q. And I realize this is put on you rather suddenly, but you also recognize as someone who is representing the State in this case, we have made the election to ask that the jury if he is found guilty, ask that the jury vote for the death penalty.

And I'm asking you a very important thing and to everyone in here, whether you, knowing that the person would never get out for the rest of his life, two things. And they're slightly different. One, whether you could consider the death penalty and the second thing I would ask you is whether you could impose the death penalty. I'm not asking a promise or anything.

But I'm asking you, first, could you consider it, and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?

A. *Yes, sir.*

Q. So this idea of him having to kill again to deserve the death penalty is someone that you are not firm on, you don't feel that now?

A. I do feel that way if parole is an option, without parole as an option. *I believe in the death penalty.* Like I said, I'm not sure that there should be a waiting line of people happening every day or every week even, but *I think in severe situations it's an appropriate measure.*

misstated the law means nothing: If all prospective jurors who did not fully understand the law before the trial began were struck, only lawyers would be allowed to serve on juries (and only a handful of lawyers at that).

[9] Z's temporary misunderstanding of the prosecution's burden of proof-he initially thought the prosecution needed to prove guilt "beyond a shadow of a doubt"-was also irrelevant; it would have been easily corrected by the jury instructions, which Z gave every indication he would follow. In fact, the prosecutor himself conceded he was unconcerned with Z's confusion on this point:

THE COURT: Counsel, any challenge to this

Q. But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?

A. *I could consider it, yes.*

Q. Then could you impose it?

A. *I could if I was convinced that was the appropriate measure.*

It is true, as the dissent suggests, that we owe the trial judge deference because of his ability to observe demeanor, but demeanor can only shed light on ambiguous language; it cannot contradict the witness's clear words. Here, juror Z's clear words were that he could impose the death penalty and would follow the court's instructions; he never said anything to the contrary. If appellate courts must defer to trial court findings on a transcript such as this because a witness may somehow have contradicted his spoken words through some unknown facial expression or body language, not only is *Witherspoon* a dead letter, but all substantial evidence review of trial court factual findings is obsolete.

particular juror?

[PROSECUTOR]: I would, your Honor, not on the term beyond a shadow of a doubt, I think he would certainly stick with the reasonable doubt standard.

And when another juror expressed that she, too, thought the burden of proof was "to a point of a shadow of a doubt," the trial judge dismissed her confusion as unilluminating:

> She doesn't know technically what the definition of beyond a reasonable doubt is. I doubt that anybody in this room knows technically what beyond a reasonable doubt really means and even in your own mind. . . . I was not so concerned with her responses of beyond a shadow of a doubt or crystal clear. I think that definitely could fit within the definition of a reasonable doubt.

[10] Finally, Brown's failure to object to juror Z's removal at trial does not alter the *Witherspoon* error analysis in this case. Brown raised the juror Z claim on direct appeal, and the Washington Supreme Court did not find the claim to be waived or procedurally barred. Nor does appellee allege that the claim is waived or barred, or that it was not exhausted in state court.[9]

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[9] The dissent from denial makes much of a defense counsel's failure to object during voir dire to juror Z's dismissal. *See* dissent at 6755, 6756, 6762, 6767. According to the dissent, defendant's lawyer could not ethically object because even he must have recognized "that Juror Z was properly dismissed for cause." *Id.* at 6762. We find it hard to believe that our colleagues take such an ingenuous view of the realities of the courtroom. As the dissenters must surely understand, defense

11] In sum, excusing juror Z for cause was directly contrary to Supreme Court precedent, as was the Washington Supreme Court's decision to uphold the juror strike on direct appeal. *See* 28 U.S.C. § 2254(d)(1).[10]

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counsel declined to object because he was glad to get rid of juror Z. After all, Z had described himself as pro-death penalty, and reiterated numerous times, under oath, that he would be willing and able to impose the death penalty. Defense counsel must have thanked his lucky starts when the prosecutor bumped Z.

We know for a fact that the dissent's "scrupulous defense counsel" theory has no basis in reality. As the dissent recognizes, defense counsel did object vigorously to *juror Y's* dismissal for cause. *See* dissent at 6761-62. Juror Y, of course, was the one who had described the death penalty as "barbaric" and as "mak[ing] . . . brutes of us all," and had crossed her arms and held her hand up when asked by the court whether she could sentence anyone to death. *See* p. 6742 and no.4 *supra*. Y was a far better juror for the defense than Z, which is why defense counsel fought so hard to keep her on the jury and then to have her reinstated. But Y had also disqualified herself under *Witherspoon*. *See* p. 6742 *supra*. Under the dissent's contrived hypothesis, Brown's lawyer would have felt morally compelled to acquiesce in Y's dismissal.

Of course, the fact that Brown's attorney was glad to see juror Z go would seem to make the trial judge's error in this case harmless. But, as we explain below, *Witherspoon* error is structural. *See* section 3 *infra*.

[10] The dissent from denial intones the mantra of *Rice v. Collins*, 126 S. Ct. 969 (2006), but forgets that in *Collins*, the state trial court made a factual finding that the juror had been dismissed for race-neutral reasons, and the California Court of Appeal upheld the dismissal based on that finding. *See id.* at 973. The Supreme Court reversed us because we "improperly substituted [our] evaluation of the record for that of the state trial court." *Id.* That is not what happened here. The Washington Supreme Court in this case *applied the wrong*

standard with respect to juror Z; it nowhere found that juror Z could not follow his oath.

To compensate for the lack of a proper *Witherspoon* finding, the dissent would impute to the state trial court a finding it never made-one that it, indeed, could not have made on this record-by suggesting that the trial judge must have incorporated the prosecutor's objection: "Excusing Juror Z was based upon the prosecutor's sole reason underlying the objection-a finding that Juror Z could not follow his oath and faithfully apply Washington's capital sentencing law. . . ." Dissent at 6758. But the prosecutor's objection said nothing at all about juror Z's ability or willingness to follow the juror's oath. Here is exactly what the prosecutor said:

THE COURT: . . . .Counsel, any challenge to this particular juror?

[PROSECUTOR]: I would, your Honor, not on the term beyond a shadow of a doubt, I think he would certainly stick with the reasonable doubt standard. But I think he is very confused about the statements where he said that if a person can't kill again, in other words, he's locked up for the rest of his life, he said, basically, he could vote for the death penalty if it was proved beyond a shadow of. And I am certainly going to concede that he means beyond a reasonable doubt. And if a person kills and will kill again. And I think he has some real problems with that. He said he hadn't really thought about it. And I don't think at this period of time he's had an opportunity to think about it, and I don't think he said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again. So, that is my only challenge.

As can readily be seen, the prosecutor says nothing about the juror's oath or whether juror Z will follow it. Rather, the prosecutor concentrates (like the dissent) on the question of whether juror Z would be willing to impose the death penalty if the alternative were life without parole. And (like the dissent) he gets it wrong. *See* n.8 *supra*. The prosecutor's reason for striking juror Z comes only two pages after juror Z's statement, yet stands juror Z's words entirely on their head. If the trial judge uncritically incorporated the prosecutor's statement into

[12] 3. Having found that juror Z was erroneously excluded, it is unnecessary for Brown to

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his ruling, as the dissent suggests, the trial judge simply nodded.

The undisputable fact is there is nothing whatsoever in juror Z's voir dire that lends the least support for the finding-explicit or implicit-that he would not follow his oath. This is a juror who listed himself as pro-death penalty in his juror questionnaire and stated repeatedly under oath that he believes in the death penalty. He did not perhaps show the kind of bloodthirsty eagerness for its imposition that the prosecutor may have preferred-juror Z did say he "would have to give [the matter] some thought" and reserved the right to impose the death penalty only when he "was convinced [it] was the appropriate measure"-but there is nothing in his testimony that could remotely support the view that he would not faithfully follow the court's instructions. No degree of deference, nor allowance for facial expressions and demeanor, can possibly fill in what isn't there: the least indication that juror Z could not or would not follow the law. If it *were* there, we are confident the dissent would have quoted it.

Curiously, our dissenting colleagues themselves seem to be confused about Washington's death penalty jury instructions. The dissent states: "There is no question that the *aggravated circumstances* of this case-kidnapping, torture, and the sadistic murder of the victim-would clearly warrant application of the death penalty under Washington law." Dissent at 960 (emphasis added). Despite the law's insistence that juries consider only *mitigating* circumstances in deciding whether a defendant should be sentenced to death, *see* Wash. Rev. Code. § 10.95.060(4); *see also* p. 6740-41 *supra*, the dissenters are transfixed by the unquestioned heinousness of Brown's crime. *See* dissent at 6763; *see also id.* at 6755 ("The facts are sickening."). The dissent even states that "[t]he trial judge obviously had [the aggravated circumstances of this case] in mind when dismissing Juror Z. . . ." *Id.* at 6763. Were this true, of course, there would have been even more blatant *Witherspoon* error; nothing in *Witherspoon* allows a judge to take the atrociousness of the defendant's crime into account when deciding whether to dismiss a juror for cause.

demonstrate he was prejudiced by Z's exclusion. Prejudice is presumed. The Supreme Court has been equally clear on this point:

> [T]his Court in *Davis* surely established a *per se* rule requiring the vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who nevertheless under *Witherspoon* is eligible to serve, has been erroneously excluded for cause. . . .
>
> . . . The instant case presents yet another opportunity for this Court to adopt a harmless-error analysis and once again we decline to do so.

Gray, 481 U.S. at 659-60 (citing *Davis v. Georgia*, 429 U.S. 122, 123-24 (per curiam) (Rehnquist, J., dissenting)). Thus, Brown's death sentence cannot stand.[11]

Ineffective Assistance of Counsel

Brown's final claim is that his attorney provided ineffective assistance in various ways during the sentencing phase of his trial. Were we not granting habeas relief with respect to Brown's sentence for the reasons set forth above, this claim

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[11] We find no constitutional infirmity with Brown's conviction. *See Bumper v. North Carolina*, 391 U.S. 543, 545 (1968) (holding that *Witherspoon* error requires setting aside a death sentence, but is insufficient to require setting aside a conviction); *see also Gray*, 481 U.S. at 668 (finding that a juror was erroneously excluded from the jury in violation of *Witherspoon* and *Witt*, and holding that "[t]he judgment of the Supreme Court of Mississippi, *insofar as it imposes the death sentence*, is reversed" (emphasis added))

would merit significant attention. Should the state choose to seek the death penalty again on remand, however, Brown will have a new opportunity to receive effective assistance of counsel. We therefore need not reach this claim.

We also do not reach the newly certified issue subsumed within Brown's ineffective assistance of counsel claim-whether the district court erred by refusing to consider certain reports in its habeas evidentiary hearing. We are reversing the district court's decision regardless of whether it should have admitted the evidence.

* * *

We reverse the district court's judgment denying the writ of habeas corpus and remand for issuance of a writ with respect to Brown's sentence, unless within a reasonable time set by the district court the state conducts a new penalty phase trial or vacates Brown's death sentence and imposes a lesser sentence consistent with law.

REVERSED IN PART; REMANDED.

TALLMAN, Circuit Judge, with whom O'SCANNLAIN, KLEINFELD, CALLAHAN, and BEA, Circuit Judges, join, dissenting from denial of rehearing en banc:

Contrary to the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2241, *et seq.*), our court overturns a fitting punishment for a just aggravated murder conviction. To do it, our panel impermissibly substitutes its own evaluation of the trial judge's discretionary ruling to dismiss a

prospective juror for cause during jury selection in this capital case, notwithstanding the inherent limitations of a written transcript and the fact that defense counsel stated immediately before the court excused the prospective juror, "We have no objection." The opinion fails to give appropriate AEDPA deference to the determination of the Washington Supreme Court which approved the trial judge's reasonable and more informed approach to jury selection in qualifying the venire. I respectfully dissent from the denial of rehearing en banc.

Rice v. Collins, 126 S. Ct. 969 (2006), reiterates our limited role and authority under AEDPA by recognizing the need for highly deferential review of a trial court's decisions in jury selection because of the constraints of a printed record, which may not adequately portray what happened in the courtroom during voir dire. Even under the standard developed in *Gray v. Mississippi,* 481 U.S. 648 (1987), for reviewing jury selection in death penalty cases, we still must afford deference to the trial court's determination that a potential juror would be "substantially impair[ed in] the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 658 (quoting *Wainwright v. Witt,* 469 U.S. 412, 424 (1985)). The defense expressly declared that it had no objection when the prosecutor moved to dismiss the venireman for cause. Nor did the defense later ask the court to reconsider his dismissal as it did for another prospective juror, who was also excused from jury service for cause. Overturning the appropriate sentence in this heinous case is legally unwarranted and nonsensical.

I

The facts are sickening. Brown kidnaped at random a woman who had just finished her shift as a hotel desk clerk near the Seattle-Tacoma International Airport. He stripped, bound, and gagged her, then proceeded to rape, sodomize, and slowly torture her over a two-day period before killing her in a manner which was anything but quick and painless. He was captured in Palm Springs, California, where he had continued his sadistic crime spree by taking captive yet another victim. The Palm Springs victim escaped her bonds to summon police and lived to testify against Brown.

During jury selection in Washington's King County Superior Court an experienced trial judge dismissed a prospective juror, Juror Z, for cause after he equivocated on whether he could impose the death penalty in conformance with Washington law by suggesting that he thought the punishment should be limited to those cases where the defendant was likely to re-offend. Juror Z was examined about that view. After both sides took the opportunity to lead the venireman through the questioning of his views, and after the judge had also asked questions of him, the prosecutor challenged Juror Z's qualification to serve based on his erroneous beliefs about the death penalty under Washington law. The defense answered, "We have no objection." The trial judge then excused Juror Z for cause. On appeal, the Washington Supreme Court rejected the argument that Juror Z should not have been excused and affirmed the ruling of the trial court.

Our court's opinion labels the Washington Supreme Court's reasons for affirming the dismissal

"misplaced and insufficient." Opinion at 6746. But the panel determined solely by reading the transcript, and contrary to the findings of both state courts, that Juror Z was in fact able to follow the law and could impose the death penalty in proper situations. *Id.* at 6746, 6749-51. In doing so, our opinion erroneously holds that the Washington Supreme Court made a decision that was both contrary to clearly established federal law, as determined by the Supreme Court in *Gray,* and was based on an unreasonable determination of the facts in light of the record. *Id.; see* 28 U.S.C. § 2254(d). Yet to reach this result under AEDPA, the dismissal must have been both objectively unreasonable in that "the state court was not merely wrong, but actually unreasonable," *Taylor v. Maddox,* 366 F.3d 992, 999 (9th Cir. 2004), and the "state court [must have] confront[ed] a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrive[d] at a result different from [Supreme Court] precedent," *Williams v. Taylor,* 529 U.S. 362, 406 (2000). Neither is the case.

II

In *Gray,* the Supreme Court reversed a Mississippi Supreme Court decision which held that it was harmless error for a state court to dismiss a potential juror for cause after the juror said she could impose the death penalty notwithstanding her views in opposition to it. 481 U.S. at 667-68. The Court concluded that, unless "the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath[,]" the trial court may not dismiss a potential juror in a death penalty case for

cause. *Id.* at 658 (internal quotation marks and citation omitted). This determination is not subject to harmless error review. *Id.* at 660.

Unlike here, the trial judge in *Gray* explicitly found that the potential juror, Mrs. H.C. Bounds, was capable of voting to impose the death penalty, but granted the dismissal anyway. *Id.* at 653-55. Bounds stated unequivocally that she could impose the death penalty without demurrer. *See id.* at 653 n.5. Nevertheless, even if Bounds had expressed hesitation, the Supreme Court held that a death penalty verdict must be vacated when "a potential juror, who has conscientious scruples against the death penalty but who nevertheless . . . is eligible to serve, has been erroneously excluded for cause." *Id.* at 659.

Still, under *Gray,* it is permissible to remove from the venire "those jurors who would frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." *Id.* at 658 (quoting *Wainwright,* 469 U.S. at 423)(internal quotation marks omitted). Since judges of the Washington Superior and Supreme Courts and a United States District Judge all found that Juror Z articulated an erroneous standard for imposing a sentence of death under state law, how can three federal judges on appeal now say, on this record, that it was objectively unreasonable for those courts to conclude that he could not follow the juror's oath? Excusing Juror Z was based upon the prosecutor's sole reason underlying the objection-a finding that Juror Z could not follow his oath and faithfully apply Washington's capital sentencing law. primarily because of his confusion and uncertainty, as reflected throughout

the entire voir dire, about when he should appropriately consider the death penalty.[1]

While our opinion cites to the guidelines set forth in *Gray*, it fails to accord those guidelines the AEDPA deference due to a state court's determination as to which jurors are "substantially impaired." On the record before our panel, the trial judge's dismissal of Juror Z could not be interpreted as "objectively unreasonable," nor is the factual situation in *Gray* sufficiently similar to conclude that the trial court's dismissal was contrary to the rule announced in *Gray*. The dismissal was simply a reasonable judgment call made by the only judge who actually saw and heard Juror Z during voir dire. There is no showing on the record that the trial judge or the Washington Supreme Court misapplied United States Supreme Court precedent. As the United States district judge so aptly observed in denying habeas relief on this ground, "Even if this Court would not have dismissed the jurors for cause, it cannot substitute its judgment for that of the state courts." Yet our panel does just that. The real question then is whether the Washington Superior and Supreme Courts made an objectively unreasonable determination of the facts in light of the record. They did not.

Juror Z stated several times that his ability to impose the death penalty was dependent on whether

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[1] What the prosecutor said to support the motion to excuse Juror Z was, in relevant part:

> I don't think he said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again. So, that is my only challenge.

the defendant was likely to re-offend, which is not the standard for imposition of the death penalty in an aggravated murder case under Washington law. *See* WASH. REV. CODE § 10.95.060(4). Although both defense counsel and the prosecutor explained to him more than once during their voir dire questioning to qualify Juror Z that, if found guilty, Brown would never be released from prison, Juror Z's answers concerning his willingness to impose death in conformance with Washington law were nonetheless confused.[2] The trial judge explained

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[2] Defense counsel explained to Juror Z that the jury would consider two sentencing options should Brown be found guilty-life without parole and the death penalty. At this point, Juror Z stated that he could consider both options. However, Juror Z then explained that he believed the death sentence would be appropriate if a person "would be incorrigible and would reviolate if released." Defense counsel once again explained the idea of life without parole, and Juror Z again said he could consider both options.

Shortly thereafter, this exchange occurred between defense counsel and Juror Z:

> Q. Understanding that the two options there are life without parole or the death penalty, there is not a lot of likelihood that people are going to spend a lot of time talking about whether or not they're going to kill again in the sentencing phase of this case. Is that going to make you frustrated? Are you going to want to hear about things like that, about people's opinions in the penalty phase?
>
> A. I'm not sure.

Even after defense counsel explained that Brown would receive either life without parole or the death penalty if found guilty, and after Juror Z claimed he could consider both options, he still misstated Washington law. While the prosecutor was questioning Juror Z about his incorrect perception of the standard of review ("beyond a shadow of a doubt" instead of "beyond a reasonable doubt"), the following exchange occurred:

twice to potential jurors, prior to Juror Z's voir dire, that life without parole was an option that the jury

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> Q. So, I want to ask you, the thing that bothers me, is the idea beyond a shadow of a doubt. The law says beyond a reasonable doubt and it will be explained to you what it actually means. But I want to assure you it doesn't mean, I don't believe the Court would instruct you it means beyond all doubt or beyond any shadow of a doubt. Knowing that, would you still require the State to prove beyond a shadow of a doubt that the crime occurred knowing that the law doesn't require that much of us?
>
> A. I would have to know the, I'm at a loss for the words here.
>
> Q. You can ask me any questions, too, if you need some clarification.
>
> A. I guess it would have to be in my mind very obvious that the person would reoffend.

A little while later, the prosecutor once again explained that life without parole was a sentencing option should Brown be found guilty. The prosecutor asked, "[C]an you think of a time when you would be willing to impose a death penalty since the person would be locked up for the rest of his life?" Juror Z responded:

> "I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole."

Contrary to the panel's assertion that Juror Z "unequivocally stated that he would be able to consider and impose the death penalty," Juror Z in fact exhibited quite a bit of confusion and equivocation through his uncertain answers as to when he would be willing to impose the death penalty. Juror Z saying in one breath that he could follow the law, and then in the next breath misstating the law, is not an unequivocal declaration that "he would be able to consider and impose the death penalty" as required under Washington law.

could consider.[3] However, even after multiple explanations by the judge, prosecutor and defense counsel, Juror Z did not grasp, nor could he be certain about, the appropriate circumstances in which as a juror he would consider imposing the death penalty. The prosecutor correctly summarized his answers, saying, "I think he is very confused about the statements. . . ." Juror Z stated at times that he could follow the law, but also stated he would "have to give it some thought" once he knew that Brown would not be paroled if found guilty. It was not unreasonable for the trial judge to conclude that, unlike juror Bounds in *Gray*, Juror Z was unfit to serve because of his indecisiveness, suggesting his inability to properly follow the court's instructions and apply the law.

Washington law does not ask the jury during the sentencing phase of a death penalty case to

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[3] On October 25, 1993, the trial judge instructed half the potential jury pool, including Juror Z, on Washington death penalty law. Specifically, the judge explained that the jury "would . . . retire to determine whether the death penalty should be imposed or whether the punishment should be life imprisonment without the possibility of parole." He further stated that, "[i]n making that determination, [each juror] would be asked the following question: Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

Furthermore, on November 3, 1993, when Juror Z was brought back for individual questioning, the trial judge informed all potential jurors that "[i]t is the State's burden to prove to [the jury] beyond a reasonable doubt the appropriate penalty, since there are only two penalties a jury could return, one is prison without the possibility of release or parole." He reiterated, "that literally means exactly that, a true life in prison without release or parole, or the penalty of death."

consider whether the defendant would re-offend. Instead, it asks the jury whether it is convinced "beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency[.]" WASH. REV. CODE § 10.95.060(4). This standard says nothing about proclivity to reoffend. It was not error for the judge to decide that Juror Z could not honestly abide by his oath to follow the law as instructed. The panel ignores the deferential AEDPA standard of review it must accord the Washington courts when it declares that any finding that Juror Z was impaired would be unreasonable.

III

Conspicuous by its absence is any motion by the defense during voir dire to challenge or reconsider the determination to remove Juror Z. Defense counsel did move in writing for reconsideration of the trial court's dismissal for cause of Juror Y, an attorney who had expressed strong reservations about the death penalty, although stating that she thought she could consider it if required. Brown filed his mid-voir dire motion to recall Juror Y or declare a mistrial and qualify a new jury panel because Brown felt that Juror Y was erroneously dismissed for cause. A few days later, Brown also filed a motion to reconsider the trial court's denial of challenges for cause regarding two other venireman who favored imposition of the death penalty. But there was no motion regarding Juror Z. Nor has Brown ever claimed defense counsel's actions during voir dire in letting Juror Z be excused from service constituted ineffective assistance of counsel.

Quite clearly those who had the opportunity to watch Juror Z's testimony, including the trial judge, the prosecution, and defense counsel, both during and after questioning him on voir dire, felt that Juror Z was properly dismissed for cause. Our panel nonetheless has held, after reviewing only the written record of Juror Z's oral voir dire, that such a determination is or would be objectively unreasonable. Given the substance of the entire record, and the constraints of our limited role as a federal habeas court, the panel has overstepped its authority under AEDPA. Congress surely intended through enacting AEDPA to end the practice by some federal judges of granting habeas relief to overturn state capital cases on rulings that even the parties did not urge to be erroneous when trying their case.

IV

Quoting selective portions of a voir dire transcript to support a particular view of the trial court's performance ignores the reality of jury selection. The voir dire process is far more complex than a simple reading of a transcript. In some cases, it will be crystal clear that a particular venireman is eligible to serve on a jury, but this is not one of those cases. Experienced trial lawyers know that there are intangible factors that influence the decision to accept or reject prospective jurors which cannot be reduced to written text in a cold record. There is no question that the aggravated circumstances of this case-kidnaping, torture, and the sadistic murder of the victim-would clearly warrant application of the death penalty under Washington law. The trial judge obviously had this in mind when dismissing Juror Z after his repeated statements that he would impose the death penalty only if convinced that

Brown would likely re-offend, a condition Washington law does not require to impose a sentence of death.

Juror Z wavered back and forth between claiming to understand what he was being told about when the Washington capital sentencing law applied, yet he reiterated his erroneous belief that death was applicable only for recidivists. The transcript reflects that he seemed easily led by both the prosecution and defense counsel into declaring an understanding that everyone in the courtroom recognized he simply did not have. This is why deference to the trial court and the fact that neither party wanted this juror are important considerations in applying AEDPA's "objectively unreasonable" standard of review. A trial judge will note pauses, hesitations, and non-verbal expressions (body language) that will factor into his decision to dismiss a potential juror:

> The way they use their hands, their eyes, their facial expression, their frankness or hesitation in answering, are all matters that do not appear in the transcribed record of the questions and answers. They are available to the trial court in forming its opinion of the impartiality and fitness of the person to be a juror.

State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991), *quoting* 14 L. Orland & K. Tegland, WASH. PRAC.. *Trial Practice* § 202, at p. 332 (4th ed. 1986). In denying Brown's motion to reconsider dismissing for cause Juror Y, the trial judge explained how he analyzed potential jurors to determine whether they are substantially impaired:

> [T]here is not any one particular response from any one of these jurors I think that is definitive for the most part. It's more of a total overall impression from everything that they have said. With [Juror Y] I guess what was most convincing was her body posture, the things that were unsaid because of the fact of the way she crossed her arms, sat back and what she was telling us at that point in time.

The "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism," *Wainwright*, 469 U.S. at 424, yet our *Brown* panel does just that. Rather than respecting the trial judge's more informed interpretation of Juror Z's demeanor, tone, and words, our panel substitutes its view, based solely on the written record, to form its own interpretation. There is a reason AEDPA requires that appellate courts give appropriate deference to trial courts during voir dire:

> Despite [the] lack of clarity in the printed record ··· there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Id. at 425-26. This case trenchantly illustrates the need for such deference.

Rice v. Collins reiterates that such deference is required when a trial court finds cause for juror bias. In *Collins*, the petitioner brought a *Batson* challenge to a peremptory strike of a young African-American woman, Juror 16, who the prosecutor

believed did not have sufficient ties to the community because of her youth, and who may have been too tolerant of the crime with which the respondent was charged. 16 S. Ct. at 973. The California Court of Appeal upheld the trial court's ruling on the peremptory challenge to credit the prosecutor's race-neutral explanations for striking Juror 16. *Id.* The district court dismissed Collins's habeas petition with prejudice. *Id.* We reversed, concluding that the state appellate court made an unreasonable factual determination in crediting the prosecutor's race-neutral reasons for striking Juror 16. *Id.*

In a unanimous decision, the Supreme Court reversed us. It held that, although we recited the proper standard of review under 28 U.S.C. § 2254(d)(2), "the panel majority improperly substituted its evaluation of the record for that of the state trial court." *Id.* "State-court factual findings . . . are presumed correct [and] the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'" *Id.* at 974 (quoting 28 U.S.C. § 2254(e)(1)). Juror 16 replied affirmatively when asked whether she believed that the crime with which the respondent had been charged should be illegal, and disclaimed any other reason she could not be impartial. *Id.* at 975. However, the Court determined that even if "the prosecutor [still] claimed to hold [race-neutral] concerns despite Juror 16's voir dire averments[, this] does not establish that she offered a pretext." *Id.* In other words, the prosecutor did not have to accept the voir dire statements of Juror 16 when there were other race-neutral grounds for the peremptory challenge.

Here, the *Brown* panel seizes upon Juror Z's

statement that he would be able to consider the option of the death penalty as a basis for its determination that the prosecutor's reason for striking Juror Z, and the trial court's willingness to credit that reason, was objectively unreasonable. But Juror Z's willingness to impose the death penalty was accompanied by his indecisiveness and an expressed viewpoint which, if followed, would result in the misapplication of Washington law. Rather than examining piecemeal the individual statements of Juror Z, the trial judge could appropriately consider Juror Z's inconsistent statements and his uncertainty as reflected throughout the entire voir dire process as a reasonable basis for his exclusion. Under *Collins,* the trial judge did not have to accept Juror Z's isolated declarations that he could follow the law if the totality of Juror Z's voir dire examination reflected his general confusion and indecisiveness about the proper application of the death penalty.

"Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination." *Id.* at 976. Although some might find that Juror Z had eschewed and rejected his prior improper basis for application of the death penalty, a reasonable mind could just as easily find that he *had not* eschewed and rejected that basis. The trial judge, as trier of fact on challenges during voir dire, is entitled to the same latitude as a jury determining the credibility of trial witnesses when judging whether a potential juror is able to serve. The superior court judge had the responsibility of weighing Juror Z's various inconsistent statements to determine Juror Z's true

ability to faithfully perform his duties as a juror by applying Washington law. He had the opportunity to watch the prospective juror testify; we did not.

V

Finally, the Washington Supreme Court need not *explicitly* declare that Juror Z was "substantially impaired" for its affirmance to count under AEDPA. True, the appellate court did not incant the words "substantially impaired." But based upon the rulings of both the trial and appellate courts, and the record in this case, we can certainly conclude that the Washington courts found appropriate the decision to excuse Juror Z on the only ground proffered by the prosecutor-that he could not discharge his oath as a juror to follow state death penalty law. While the record may be susceptible to different interpretations by reasonable jurists, AEDPA demands that we must be able to conclude that the decision was "objectively unreasonable" to grant relief. That standard is simply not met here.

By listening to the voir dire statements of Juror Z, watching how he answered specific questions during voir dire, considering the prosecutor's reason for wanting to dismiss Juror Z for cause, and hearing the defense state that it had no objection to the motion, the trial judge implicitly found that Juror Z was "substantially impaired" by excusing him for cause. Nothing more is required. *See Wainwright,* 469 U.S. at 430. The Supreme Court in *Wainwright* said that in making rulings on voir dire objections, the judge is not "required to announce for the record his conclusion that [the potential juror] was biased, or his reasoning," when "[t]he finding is evident from the record." *Id.* It is

especially telling when the defendant does not object to the dismissal, as was the case when Brown's lawyer rose before the court and expressly stated that she had no objection to excusing Juror Z.

We must afford the same presumption of correctness to the Washington Supreme Court in reviewing the trial court's factual determination of juror bias. *See Tinsley v. Borg*, 895 F.2d 520, 526 (9th Cir. 1990) ("Even though the state appellate court is, in a sense, in no better position than we are to evaluate the state trial court record, [the habeas statute] requires us to accord the same presumption of correctness to its factual findings."). Specifically, the Washington Supreme Court concluded in reference to Juror Z's voir dire:

> Appellant did not object at trial to the State's challenge of [Juror Z] for cause. At any rate,[Juror Z] was properly excused. On *voir dire* he indicated he would impose the death penalty where the defendant "would reviolate if released," which is not a correct statement of the law. He also misunderstood the State's burden of proof in a criminal case and understood it to be "beyond a shadow of a doubt," although he was corrected later. The trial court did not abuse its discretion in excusing [Juror Z] for cause.

Washington v. Brown, 940 P.2d 546, 585 (Wash. 1997).

Whether or not the Washington Supreme Court intoned the magic words, "substantially impaired," it affirmed the trial court because of Juror Z's erroneous belief about when the death penalty should be applied under Washington law. By doing

so, it impliedly determined Juror Z would be substantially impaired in his duties as a juror to follow the law by holding that he was properly dismissed for cause.

VI

This opinion unfairly rids the trial court of the discretion it must necessarily possess in determining juror bias in death penalty cases. Ostensibly, *Brown* stands for the proposition that if the written record is not absolutely and explicitly clear as to whether a dismissed juror could not correctly deliberate on imposition of the death penalty, we must vacate the death sentence if that juror was nonetheless dismissed by the judge who watched him respond to the questions on voir dire without defense objection. That is simply not the way the Supreme Court has directed us to review jury selection under AEDPA, even after *Gray*. *See Collins*, 126 S. Ct. at 973-75; *supra*, § IV. Indeed, *Wainwright* declared prior to *Collins* that deciding to dismiss a potential juror "does not require that a juror's bias be proved with unmistakable clarity." 469 U.S. at 424 (internal quotation marks omitted). While we do not and will not rubber stamp on habeas review juror dismissals in death penalty cases, AEDPA surely requires more deference to the Washington courts than that paid by our court in this one.

Finally, this opinion impermissibly lowers the level of deference which comity demands that we as a federal habeas court afford state courts in reviewing their decisions and findings of fact. *Brown's* lower standard of "reasonableness review" severely handicaps a trial judge's ability to go beyond the scope of mere words and phrases taken piecemeal

from the entire voir dire process. This new standard ignores the need for litigants and the trial judge to interpret the prospective venireman's answers, considering them along with body language and demeanor. Because AEDPA, as reinforced by the Supreme Court, commands greater comity when federal courts review these kinds of practical decisions by experienced state judges in capital cases, I respectfully dissent from our court's unwillingness to rehear this case en banc.

United States District Court

WESTERN DISTRICT OF WASHINGTON

CAL COBURN BROWN

v.

JUDGMENT IN A CIVIL CASE

JOHN LAMBERT

CASE NUMBER: C01-715C

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT Petitioner's Amended Petition for Writ of Habeas Corpus is DENIED in its entirely.

September 16, 2004

BRUCE RIFKIN

Clerk

s/L. Simle

By, Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CAL COBURN BROWN Petitioner, v. JOHN LAMBERT, Respondent.	Case No. C01-715C ORDER

INTRODUCTION

This matter comes before the Court on Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt. No. 56). The Court has considered the Petition and Answer (Dkt. No. 60), in addition to Petitioner's and Respondent's Closing Arguments and Reply Briefs (Dkt. Nos. 148-49, 152, 154), and the balance of the record. For the following reasons, Cal Coburn Brown's Petition for Writ of Habeas Corpus is hereby DENIED in its entirety.

BACKGROUND

Petitioner is currently in the custody of the Washington Department of Corrections pursuant to his December 10, 1993 conviction and January 28, 1994 sentence of death for the aggravated first degree murder of Holly Washa. The events giving rise to Petitioner's conviction are lengthy and involve incidents involving two women in both Washington and California.[1] The facts, as in all death penalty

[1] In addition to Ms. Washa, the facts also refer to Ms. Susan Schnell, whom Petitioner assaulted in California. It was

cases, are gut-wrenching and gruesome. On one hand a repetition of these details seems unnecessary, and indeed inflammatory, since a more thorough recitation of the facts can be found in *State v. Brown*, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998), and since this Court's analysis focuses more on the state court's application of the law than on any factual issue. However, the Court finds that it is necessary to relate the details of Petitioner's crimes here as they provide the necessary backdrop for several of Petitioner's claims, particularly his ineffective assistance of counsel claim. The Court thus includes the following description of Petitioner's crimes, as recounted by the Washington Supreme Court:

> On May 27, 1991, Memorial Day, King County police, following a telephone call from police detectives in Palm Springs, California, discovered the body of a twenty-one-year-old woman, Ms. Holly C. Washa, in the trunk of her 1985 blue Oldsmobile automobile parked in space 266 of a Budget Park and Ride lot near the Seattle-Tacoma Airport. She was wearing a leather jacket covered with blood, and the strap of her purse was tied and knotted tightly around her neck. The strap was sunken into the cavity of a deep slash wound across her neck.
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> [...]

Ms. Schnell's call to the Palm Springs police that was instrumental in Brown's arrest and subsequent confession as it relates to Ms. Washa. The facts, as they relate to Petitioner's connection to Ms. Schnell, are omitted from this Court's discussion.

[Appellant Brown's] Statement to Police

On May 27 and 28, 1991, Appellant made statements to police detectives in Palm Springs, California in three interviews which were recorded without his knowledge. In his statements he related in calm, deliberate, clear, graphic and specific detail a narrative of his activities, with few questions from the detectives, who courteously allowed him to relate his story. [Footnote omitted.] His statements may fairly be characterized as admissions or confessions. [Footnote omitted.]

On the morning of May 23, 1991, Ms. Holly C. Washa was at the Wyndham Garden Hotel near the Seattle-Tacoma Airport where she had just quit her part-time job. As she was driving out of the parking lot in her 1985 Oldsmobile, Appellant pointed to one of the tires on her automobile suggesting something was wrong. She stopped. Appellant then forced then forced his way into her automobile, stuck a knife [footnote omitted] in her face, and grabbed her by the hair. He demanded that she "drive or die," and began rummaging through her purse for money. Finding only a small amount of change, he looked at her checkbook. He then forced her to write a check for $350.00, the entire balance in her checking account. They went through the drive-up window at a Seafirst Bank in Federal Way and cashed the check. Then they went to the Seattle waterfront area where Appellant tied Ms. Washa's hands behind her back with her purse strap and forced her into the passenger seat of her automobile. He asked

her several questions concerning her schedule on a typical day, who her roommates were and what they did. [Ex. 89, tape 1, side 2.] He then purchased some handcuffs at a gun shop while leaving Ms. Washa tied up in the automobile. [Ex. 89, tape 2, side 1.]

After purchasing the handcuffs, Appellant took Ms. Washa back to his room at the Shadow Motel where he paid for an extra night. He demanded that she remove all her clothing, after which he tied her to the bed with his neckties and her purse strap. He cut up her shirt and stuffed it into her mouth for a gag. He then ordered her to get dressed again and took her to get something to eat. While at a Burger King drive-through, he held the knife in a threatening position where she could see he might use it. Upon their return to the motel room, he ordered her to remove her clothing and lie face down on the bed. He also told her not to scream or do anything. Appellant said Ms. Washa began fellating him, which he took as her consent for sexual activity. [Ex. 89, tape 1, side 2.]

Appellant then engaged in sexual intercourse with Ms. Washa for about two hours, during which time he noticed she was looking at the door and possibly thinking of escape. Appellant decided it was time "to have a little control, . . . make her a little more scared of me, basically." He then tied her in a face up, spread eagle position, with her hands behind her back and her mouth gagged, and whipped her "maybe half a dozen times. . . ." [Ex. 89, tape 2, side 1.]

Appellant allowed Ms. Washa to get dressed again, tied her hands behind her back, and drove her to Federal Way for pizza. When they returned to the motel, Appellant again forced her to undress and tied her to the bed in a face down, spread eagle position with her hands tied behind her back. He then had sexual intercourse with her again. At about 11:00 p.m. that evening, he telephoned Ms. Susan J. Schnell in California to reconfirm their weekend plans in Palm Springs. After that, he crawled into bed with Ms. Washa, who was still bound and gagged, and they "dozed." [Ex. 89, tape 2, side 1.]

The next day, Friday, May 24, 1991, Appellant forced Ms. Washa to drive him to her apartment where he hoped to find checks belonging to her roommates that he could forge. He found some checks and attempted to cash them in $500.00 amounts, but was thwarted when the banks wanted to compare signatures with signature cards on file. Appellant became irritated with Ms. Washa when the check-cashing plan did not go as he had hoped. She began to drive somewhat erratically, making him even angrier. [Ex. 89, tape 2, side 1.]

When they returned to the motel, Appellant again tied Ms. Washa to the bed face down in a spread eagle position with her hands handcuffed behind her back and her mouth gagged with a washcloth. He penetrated her vaginally and anally with an aftershave lotion bottle. [Ex. 89, tape 2, side 2.] He shaved her pubic hair and held a hot hair dryer close to

her vagina, breasts and stomach. He also shocked her by using an electric extension cord with the end cut off. He described these acts as "torture" and acknowledged that the electric shock was particularly painful. [Ex. 89, tape 1, side 2.]

At 8:45 on the evening of May 24, 1991, Appellant left for the Seattle-Tacoma Airport to embark on his trip to California. He forced Ms. Washa into the trunk of her blue 1985 Oldsmobile automobile with her hands handcuffed behind her back and drove to the Doug Fox Travel Agency parking lot where he momentarily parked the automobile. Because shuttle buses were driving around the lot, Appellant was concerned that someone might discovery Ms. Washa since "she could just bang and clang and crunch and scream and be out very quickly." [Ex. 89, tape 2, side 1.] He then went to the trunk and cut her throat with "three swipes" and stabbed her several times in the chest and abdominal areas. [Ex. 89, tape 3, side 1.] Because Ms. Washa's blood began leaking from the trunk of the automobile, Appellant moved from the Doug Fox lot to the Budget Park and Ride lot near Shumsky's Restaurant in the airport area. He told detectives:

> I was going to do her at one place and leave here there and the blood started coming out from underneath the car. . . . So I panicked and left that place and drove around to a different place . . . with all the rain and stuff it would just wash away and it wouldn't show.

[Ex. 89, tape 1, side 2.]

Appellant told detectives he killed Ms. Washa because he did not want to leave any witnesses alive. He also told them he kidnapped her because he needed money to get to California and "didn't like the idea of waltzing into a bank with my face, you know, all over the place." He also stated he was "going to rob somebody and let 'em go but then I just realized . . . after I did it that it would just be the same as waltzing into a bank and have my picture taken." [Ex. 89, tape 1, side 2.]

Appellant also told his Oregon parole officer, Larry Wibbenmeyer, in a telephone conversation on May 28, 1991 that he took Ms. Washa's life at the last minute. He described his actions as resulting from "panic."

Events in California

[...]

After being processed by the Palm Springs police, Appellant was interviewed by Detective Mark Harvey and his partner, Detective Al Franz. Three interviews took place between May 27 and May 28, 1991, with the first two initiated by the detectives and the third initiated by Appellant. Before each interview, Appellant was read his *Miranda* rights, stated he understood them, and agreed to talk with the detectives. Each interview was tape recorded without Appellant's knowledge or consent. During the first interview, Appellant in specific detail admitted his attack upon Ms. Schnell. Later in that interview, he admitted

killing Ms. Washa before coming to Palm Springs. He told the detectives where the killing took place in Washington and where Ms. Washa's automobile could be found. The Palm Springs police immediately contacted King County police who dispatched local officers to the Budget parking lot near the Seattle-Tacoma Airport where they located the 1985 blue Oldsmobile in space 266 with Ms. Washa's body in the trunk. Appellant still had the keys to Ms. Washa's automobile in his possession. [...]

Corroborating Evidence

King County Medical Examiner Donald T. Reay, M.D. performed an autopsy on Ms. Holly C. Washa. He concluded her death was caused by an extensive incised wound to her neck and strangulation by a ligature with a very rigid knot. He also noted that both stabbing and slicing occurred in the throat, requiring at least two motions to inflict the incised wound. It was his opinion that the hemorrhages in her eyes indicated the strangulation occurred first.

In addition to the lethal injuries, Dr. Reay described other trauma to Ms. Washa's body. Her pubic hair had been shaved. Her face was severely bruised. Both the insider and outside of her vaginal area were bruised. There was also bruising around her anus. The vaginal and anal injuries indicated forcible penetration with a hard object consistent with an aftershave bottle belonging to Appellant found in his Palm Springs hotel room. Her nipples showed abrasions and a linear pattern

of bruising consistent with being whipped by a belt or cord. Similar bruising was found on her inner thigh, which also indicated whipping. Her feet and ankles were covered with bruises consistent with having been restrained. Her chest and abdomen had multiple stab and slicing wounds. An "irregular blemish-like area of red drying" on her inner thigh indicated burning. The stab wounds were consistent with the knife blade of the Leatherman tool Appellant had in his pocket when he was arrested. [FN 17]

> FN 17. The State also presented corroborating witness testimony and physical evidence. *See* Br. Of Resp't at 24-27.

Appellant was charged by information on June 11, 1991 in the King County Superior Court with aggravated murder in the first degree. He was arraigned on February 26, 1992. A notice to determine whether the death penalty should be imposed was filed on March 24, 1992. He was tried by jury before the Honorable Ricardo S. Martinez. The trial began with jury selection on October 25, 1993. Guilt phase testimony began on November 30, 1993. On December 10, 1993, the jury returned a verdict of "guilty" of premeditated murder in the first degree, finding that Appellant committed the murder to conceal commission of a crime or to protect or conceal his identity; and found aggravating circumstances of robbery in the first or second degree, rape in the first or second degree and kidnapping in the first degree. The penalty

> phase of the trial began on December 15, 1993, and on December 27, 1993, the jury returned a verdict finding there were not sufficient mitigating circumstances to merit leniency. The trial court on January 28, 1994 imposed upon Appellant a sentence of death.

State v. Brown, 940 P.2d 546, 555-59 (Wash. 1997).

The Washington Supreme Court denied both Petitioner's post-conviction appeal and personal restraint petition ("PRP"). *See Id.*; *In re the PRP of Brown*, 21 P.3d 687 (Wash. 2001). Turning to federal court, Petitioner filed his original petition for writ of habeas corpus under 28 U.S.C. § 2254 on June 13, 2001 (Dkt. No. 8) and filed an amended petition on July 15, 2002 (Dkt. No. 56). The Court held an evidentiary hearing on November 3 and 4, 2003, on Petitioner's claim of ineffective assistance of counsel at the sentencing phase of the trial. Briefing is now complete and Petitioner's habeas petition is ready for review.

GROUNDS FOR RELIEF

Brown sets forth eight grounds for relief in his amended habeas petition. He formulates his claims as follows:

> (1) The Washington death penalty statute, Wash. Rev. Code § 10.95.010 (2000), *et seq.*, on its face and as authoritatively construed by the Washington Supreme Court in this case violates the Eighth and Fourteenth Amendments to the United States Constitution.
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> (2) The Washington death penalty statute is vague on its face and violates the Eighth

Amendment and the Due Process Clause of the Fourteenth Amendment.

(3) As construed by the Washington Supreme Court in this case, the Washington death penalty statute violates the Eighth Amendment and the Ex Post Facto Clause of the United States Constitution.

(4) Petitioner was denied due process under the Fourteenth Amendment when a critical portion of the trial transcript was lost before Petitioner's direct appeal.

(5) Petitioner's confession was obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

(6) Petitioner's jury was selected in violation of the due process clause of the Fourteenth Amendment.

(7) Withdrawn by Petitioner.

(8) Petitioner was deprived of his Sixth Amendment right to the effective assistance of counsel at the sentencing phase.

(9) Withdrawn by Petitioner.

(10) The Washington procedures for seeking post-conviction relief, as they were administered by the Washington Supreme Court in this case, failed to comport with the minimum requirements of due process of law.

(Am. Pet. At Dkt. No. 56)

DISCUSSION

Exhaustion of State Remedies

In order to present a claim to a federal court for review in a habeas corpus petition, a petitioner must first have presented that claim to the state court. *See* 28 U.S.C. § 2254(b)(1). The parties do not dispute that Brown properly exhausted his available state remedies by fairly presenting the eight claims to the Washington Supreme Court as federal claims. (*See* Answer at 16) The Court will thus examine all of Petitioner's alleged grounds for relief.[2]

Standard of Review

"Principles of comity and federalism counsel against substituting our judgment for that of the state courts." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). The deference referenced in this statement is embodied in the requirements of the federal habeas statute, as amended by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *Id.* Accordingly, under AEDPA, a habeas corpus petition may be granted with respect to any claim adjudicated on the merits in state court only if the state court's adjudication is *contrary* to, or involved in *unreasonable application of*, clearly established federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d) (emphasis added). Under the "contrary to" clause, a federal habeas court may grant the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529

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[2] The Court also notes that the parties have stipulated that Petitioner timely filed his habeas petition within AEDPA's one-year statute of limitations. (*See* Stipulation at Dkt. No. 26.)

U.S. 362, 403-05 (2000). Under the "reasonable application" clause, a federal habeas court may grant the writ only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* The opinions of this Court regarding the death penalty are irrelevant to the analysis of Petitioner's claims.

The Supreme Court recently refined the Ninth Circuit Court of Appeals' interpretation of the phrase "unreasonable application." In *Lockyer v. Andrade*, 538 U.S. 63 (2003), the Supreme Court held that the Ninth Circuit has interpreted the phrase too broadly, as being synonymous with "clear error." The Court reasoned:

> These two standards, however, are not the same. The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness. *It is not enough that a federal habeas court, in its "independent review of the legal question" is left with a firm conviction" that the state court was "erroneous."* [...] [A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. *Rather, that application must be objectively unreasonable.*

Id. at 68-69 (emphasis added; internal citations omitted). Thus, the Supreme Court has clarified that federal courts should be even more deferential to state courts than the Ninth Circuit had previously

determined. *See Hall v. Dir. Of Corrs.*, 343 F.3d 976, 986 (9th Cir. 2003) (Tallman, J., dissenting). A state court decision may be overturned *only* if the decision is "objectively unreasonable," which means something more than merely "incorrect or erroneous." *Riley v. Payne*, 352 F.3d 1313 (9th Cir. 2003).

In addition, a habeas corpus petition may be granted if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d). The "unreasonable determination" clause usually applied to situations where petitioner challenged the state court's findings based entirely on the state court record. *Taylor*, 366 F.3d at 999 (internal citations omitted). "Such a challenge may be based on the claim that the finding is unsupported by sufficient evidence, that the process employed by the state court is defective, or that no finding was made by the state court at all." *Id.* Once the state court's fact-finding process survives this intrinsic review, the state court's findings are "dressed in a presumption of correctness, which then helps steel them against any challenge based on extrinsic evidence, i.e., evidence presented for the first time in federal court." *Id.* The burden is on the petitioner to rebut the presumption of correctness by clear and convincing evidence. *Sumner v. Mata*, 455 U.S. 591 (1982); 28 U.S.C. § 2254(e)(1).

Finally, relief may be granted on a federal habeas corpus petition only if the state court error caused "actual prejudice" or had a "substantial and injurious effect or influence" in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). In other words, relief may not be granted

if petitioner merely shows that there is a reasonable possibility that the error contributed to the verdict. *Id.*

Petitioner's First Three Grounds for Relief: Constitutionality Issues

Petitioner's first three claims all allege that the Washington Death Penalty Statute, Wash. Rev. Code § 10.95.010, *et seq.*, violates various constitutional rights. In understanding these claims, an introduction to Eighth Amendment[3] Jurisprudence is useful.

At a minimum, states must properly establish a threshold below which the death penalty cannot be imposed. *Romano v. Oklahoma*, 512 U.S. 1, 6-7 (2004) (citing *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987)). First, "[t]o pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). The intent is to "minimize the risk of wholly arbitrary and capricious action." *Zant*, 462 U.S. at 874 (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)). Second, "[s]tates must ensure that capital sentencing decisions rest on [an] individualized inquiry, under which the character and record of the individual offender and the circumstances of the particular offense are

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[3] The Eighth Amendment prohibits "cruel and unusual punishments" and is applied to the states through the Due Process Clause of the Fourteenth Amendment. *See* U.S. Const. amend. VIII; *Robinson v. California*, 370 U.S. 660, 667 (1962).

considered. *Romano*, 512 U.S. at 7 (citing *McCleskey*, 481 U.S. at 303). The sentencer must be allowed to consider any relevant information offered by the defendant. *Id.* Within these limits, however, states "enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 300 (1990). This latitude extends to evidentiary rules at sentencing proceedings. *Romano, supra*, at 7. Finally, "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." *Id.* at 8 (citing *California v. Ramos*, 463 U.S. 992, 1008 (1983)).

The United States Supreme Court classifies state death penalty statutes as either "non-weighing" or "weighing" depending on the process by which the sentencer considers or weighs a variety of factors in deciding whether to impose the death penalty. *See Williams v. Calderon*, 52 F.3d 1465, 1478 nn.11-13 (9th Cir. 1995), *cert. denied*, 516 U.S. 1124 (1996). In *State v. Brown* the Washington Supreme Court held that Washington is a non-weighing state. 940 P.2d at 591-92. In the penalty phase of a capital murder trial in Washington, the jury is asked a single question which is, "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient circumstances to merit leniency?" *See* Wash. Rev. Code § 10.95.060(4). All manner of collateral crimes evidence is admissible during the penalty phase. *See State v. Brown*, 940 P.2d at 592 (citing Wash. Rev. Code § 1095.060; Wash. Rev. Code

§ 10.95.070; *State v. Jeffries*, 717 P.2d 722 (Wash. 1986); *State v. Mak*, 718 P.2d 407 (Wash. 1986)).

In his first ground for relief, Petitioner argues that the Washington Death Penalty Statute on its face and as authoritatively construed by the Washington Supreme Court in this case violates the Eighth and Fourteenth Amendments because it is "devoid of meaningful guidelines and standards for the sentencer to apply in determining whether the sentence should be life imprisonment or death." (Am. Pet. At ¶ 1.1.) Petitioner makes this argument on the basis that the jury is given no guidance as to how the collateral evidence factors into their deliberations. No such guidance is required by law.

A statute identifying aggravating circumstances need not also provide standards to govern the jury in weighing the significance of those circumstances. *Zant*, 462 U.S. at 880. "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." *Tuilaepa v. California*, 512 U.S. 967, 979 (1994). There is simply no support for Petitioner's argument that "meaningful guidelines and standards" instructing jurors how to weigh collateral evidence are required to pass constitutional muster. Accordingly, Petitioner's first ground for relief is hereby denied.

Petitioner's second ground for relief states that the Washington Death Penalty Statute is vague on its face and violates the Eighth and Fourteenth Amendments because Wash. Rev. Code § 10.95.060(3) allows evidence of defendant's previous criminal activity without defining the word "previous." To wit, Petitioner argues "previous"

could mean either crimes occurring before the crime of conviction or it could mean crimes occurring before the penalty phase of the capital trial. Petitioner's argument is based on the fact that in the penalty phase of the Petitioner's trial, the jury was told that it could consider evidence of an attempted murder in California in deciding whether or not to impose the death sentence. The California attempted murder occurred after the crime that Petitioner was convicted of in this case.

The Washington Supreme Court held that the statute was not unconstitutionally vague. *In re PRP of Brown*, 21 P.2d page, 701-03 (2001). In his PRP, however, Petitioner took issue with the word "relevant" in Wash. Rev. Code. § 10.95.070(1).[4] The Court held that the statute was not vague because it lists eight factors for a sentencing jury to consider in deciding whether leniency is merited. *In re PRP of Brown*, 21 P.2d at 702. Petitioner's formulation of his claim is slightly different in his federal habeas petition. Instead of the word "relevant" he identifies the word "previous" as vague. This change in argument is likewise unavailing.

Petitioner's criminal record is admissible during the penalty phase of a capital trial. *See Tuilaepa v. California*, 512 U.S. 967, 978 (1994) (stating "[n]othing in the United States Constitution prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant's

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[4] Wash. Rev. Code § 10.95.070(1) states in pertinent part "[i]n deciding the question posed by [Wash. Rev. Code] § 10.95.060(4), the jury . . . may consider any relevant factors, including but not limited to the following: (1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity."

prior criminal record in making its sentencing determination."). In fact, even unadjudicated criminal conduct may be introduced to support an aggravator factor such as probably future violence. *Campbell v. Kincheloe*, 829 F.2d 1453, 1461 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). The evidence of the attempted murder in California, therefore, was admissible evidence, whether it occurred before the crime of conviction or before the penalty phase of the capital trial. Petitioner's argument that "previous" should specify which of these time periods is the relevant time period for considering the admissibility of a defendant's prior criminal record is simply splitting hairs. Since Washington's Death Penalty Statute complies with Supreme Court precedent, Petitioner's second ground for relief is also denied.

In his third ground for relief, Petitioner argues that, as construed by the Washington Supreme Court in this case, the Washington Death Penalty Statute violates the Eighth Amendment and Ex Post Facto clause of the United States Constitution. Petitioner argues that following his conviction and sentence, the Washington Supreme Court construed the word "previous" in Wash. Rev. Code § 10.95.060(3) to mean prior to the date of the penalty phase of Petitioner's capital trial.

In *Rogers v. Tennessee*, the Supreme Court affirmed that the Ex Post Facto Clause "is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of the government." 532 U.S. 451, 456 (2001) (quoting *Marks v. United States*, 430 U.S. 188, 191 (1977)). As Respondent correctly points out, petitioner's ex post facto claim fails as a matter of

law. In the same opinion, the Supreme Court also observed that "limitations on ex post facto judicial decisionmaking are inherent in the notion of due process," however, due process does not incorporate the specific prohibitions contained in the Ex Post Facto Clause. *Id.* at 456, 458-59. Instead the focus of a due process analysis is on "the right to fair warning as those concepts bear on the constitutionally of attaching criminal penalties to what previously had been innocent conduct." *Id.* at 459. Accordingly, the Supreme Court has held that retroactive judicial expansion of a criminal statute violates due process only when the state court's prior opinions had not given the "slightest indication" that the person's conduct violated the law. *Id.*

In response to this claim for relief, the Washington Supreme Court held:

> [Brown] claims a sentencing jury cannot consider his California convictions of August 30, 1991 as "prior criminal activity" under [Wash. Rev. Code] § 10.95.070(1) because those convictions occurred after the crime for which he was convicted in King County was committed on May 24, 1991. Nothing in [Wash. Rev. Code § 10.95.070(1) indicates a sentencing jury may only consider convictions occurring prior to the date of the crime for which defendant is being tried. It is sufficient that the prior conviction be established prior to conclusion of the case before the court.

In re PRP of Brown, 21 P.3d at 698. There was plenty of indication that the state court would interpret the statute in this manner. Indeed, construed in conjunction with Wash. Rev. Code §

10.95.070(8),[5] Petitioner had fair warning the evidence of the attempted murder in California would be deemed admissible. The Court finds that the state court decision was neither contrary to, nor an unreasonable application of, clearly established federal law. Petitioner's third ground for federal habeas relief is hereby denied.

Petitioner's Fourth Ground for Relief: Lost Trial Transcript

Petitioner asserts that he was denied due process under the Fourteenth Amendment when an allegedly critical portion of the trial transcript was lost before Petitioner's direct appeal. His argument is supported by the following facts. The trial court held a series of pre-trial hearings under CrR 3.5 and the Washington Right of Privacy statute, Wash. Rev. Code § 9.73, *et seq.*, to determine the admissibility of the secretly tape recorded interviews. (SR 5572-73.) The first hearing took place in July 10, 1992. (*Id.*) Palm Springs Detective Mark Harvey testified at that hearing. (*Id.*) There is no verbatim report of proceedings of the July 10 testimony, due to the failure of the court reporter to find his notes of that hearing. (*Id.*) Upon order of the Washington State Supreme Court, the trial court presided over the preparation of a supplemental report of proceedings.

Petitioner objects that the supplemental report of proceedings provided an inadequate record

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[5] Wash. Rev. Code § 10.95.070(8) states in pertinent part "[i]n deciding the question posed by [Wash. Rev. Code] § 10.95.060(4), the jury . . . may consider any relevant factors, including but not limited to the following: (8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

for appeal.[6] Specifically, Petitioner asserts that the supplemental report of proceedings did not specify what, if any, *Miranda* warnings the Palm Springs police gave to Mr. Brown in May 1991, including whether he was advised that he had the right to consult with counsel before making any statements, and whether he waived those rights. Respondent argues that given the existing transcripts, the supplemental report of proceedings, and the remaining documents in the record relating to the issue of the *Miranda* warnings, the Washington Supreme Court reasonably determined that there was a sufficient record for appellate review, and the state court reasonably rejected Petitioner's claim. Respondent also argues that Brown's claim fails because he fails to present any proof of prejudice.

In responding to the Petitioner's argument that a record of sufficient completeness was not provided for appellate review, the Washington Supreme Court held:

> The trial court's Supplementation of Report of proceedings, based upon contemporaneous notes taken by the court on July 10, 1992, constitutes a narrative report of proceedings for that portion of the hearing sufficient to make the record complete. Appellant's assertion that the trial court's narrative report is "conclusory at best" on this issue of *Miranda* warnings is rebutted by the fact that, along with the trial court's narrative report, the record on review also contains the tape

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[6] The report simply stated that "[t]he Defendant was advised of his *Miranda* rights on tape and the tape was allowed to run for the length of the interview." (SR 5578, 5583.)

> recordings of Appellant's statements to the Palm Springs Police which included *Miranda* warnings, [footnote omitted] as well as the trial court's oral ruling on the issue of *Miranda* warnings and [Wash. Rev. Code § 9.73]. [footnote omitted]. Additionally, there are verbatim repots of all other proceedings, including the testimony of Ms. Schnell, Ms. West and Ms. Gray. We reject Appellant's claim that the record is not sufficiently complete for review of the issues in this case.

State v. Brown, 940 P.2d at 579-80. For the following reasons, this Court agrees with Respondent that the Washington Supreme Court reasonably rejected Petitioner's claim.

The procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the U.S. Constitution. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). An appellate process that provides a criminal defendants appellant the minimum safeguards necessary to make the appeal "adequate and effective" satisfies both due process and equal protection concerns. *Smith v. Robbins*, 528 U.S. 259, 276-77 (2000). The Supreme Court has held that "[i]n terms of a trial record, this means that the State must afford the indigent a 'record of sufficient completeness' to permit proper consideration of his claims." *Mayer v. Chicago*, 404 U.S. 189, 194 (1971) (quoting *Draper v. Washington*, 372 U.S. 487, 499 (1963) (internal citations omitted)). This does not mean that a state must provide a verbatim transcript of the entire proceedings. *Id.*

Rather, what is constitutionally impermissible

is the total denial of a transcript based on indigency. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion) (holding a court cannot make available a trial transcript to those who can afford it, but deny the transcripts to those who are indigent). In *Norvell v. Illinois*, 373 U.S. 420 (1963) the Supreme Court declined to extent Griffin to cases where the transcript was unavailable due to the death of the court reporter. Instead the Court held that "some practical accommodation must be made." *Id.* at 424. This means that "[a]lternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise." *Mayer*, 404 U.S. at 194; *See also Draper v. Washington*, 372 U.S. 487 (1963) (speculating that narrative statement based on the trial judge's minutes taken during trial, a court reporter's untranscribed notes, or a bystander's bill of exceptions may all be equally as good as a transcript.

Several courts have also added to this a required showing of prejudice. *Bransford v. Brown*, 806 F.2d 83 (6th Cir. 1986) (holding the unavailability of transcripts of jury instructions is not a *per se* violation of a criminal defendant's due process rights, and requiring the petitioner to also show prejudice resulting from the missing transcript); *White v. State of Fla. Dept. of Corrections*, 939 F.2d 912, 914 (11th Cir. 1991) (finding the absence of a perfect trial transcript does not violate due process absent a showing of specific prejudice). *See also Scott v. Elo*, __ F.3d __, 2002 WL 2030715 (6th Cir. August 8, 2002) (stating that speculation that a transcript might aid the petitioner's claim is not sufficient to show a violation

of due process).

In the case at bar, Petition was only lacking the transcript for a single pre-trial hearing. Although the Supplementation of Report Proceedings did not specify what, if any, *Miranda* warnings the Palm Springs police gave to Mr. Brown in May 1991, any uncertainty could have been dispelled by the admission of the taped confession into evidence. In light of the Supreme Court concession that, absent verbatim transcripts of proceedings, "alternative methods of report trial proceedings are permissible" this Court must find that the Washington Supreme Court's finding that the narrative report, the tape recordings, and the trial court's oral ruling on the issue of *Miranda* warnings, in addition to the verbatim reports of all other proceedings, provided a sufficient record for appellate review was neither contrary to, nor an unreasonable application of clearly established federal law. Petitioner's fourth ground for relief is hereby denied.

Petitioner's Fifth Ground for Relief: Alleged Violation of Petitioner's Miranda Rights

Petitioner claims that his confession was obtained in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Specifically, Petitioner argues that the warnings given to him by the Palm Springs police were deficient under the Constitution and under *Miranda v. Arizona*, 384 U.S. 436 (1966), because the warnings failed to specifically advise him that he had a right to counsel before being questioned. The Washington Supreme Court held that, although the warnings did not apprise Brown that he had a right to counsel before questioning, other verbiage in the

warnings made that concept clear. *State v. Brown*, 940 P.2d at 575 ("[a]lthough the actual words 'before questioning' were not included in the first part of the statement, the second part which read 'and to have him present when you're being questioned' made that point sufficiently clear."). Petitioner asserts that the decision of the Washington Supreme Court was contrary to, or an unreasonable application of, clearly established federal law as stated by the Supreme Court and was based upon an unreasonable determination of the facts as presented in the state court proceedings.

Respondent argues that the *Miranda* warnings, when read as a whole, adequately advised Brown that he had the right to consult with counsel before questioning. Respondent further argues that Brown had extensive previous experience with police and prosecutors. He had a lengthy criminal history, including 1979 convictions for assault, NSF checks, possessing a syringe needle, a 1981 grand theft conviction, and 1984 assault convictions. (SR 6959.) Respondent suggests that the Washington Supreme Court reasonably determined that Brown was adequately advised of his *Miranda* rights, and that decision is not contrary to or an unreasonably application of clearly established federal law, therefore Brown is not entitled to relief.

The *Miranda* rule is a "prophylactic" measure that is meant to protect against violations of the Self-Incrimination Clause of the Fifth Amendment, which prohibits compelling a criminal defendant to testify against himself at trial. *See e.g., Chavez v. Martinez*, 538 U.S. 760, 764-68 (1994). The rule presumes that interrogation settings are coercive when a defendant is held in custody and pressured to confess without

specific warnings of his right to remain silent. *Miranda* warnings are, therefore, required before defendant's statement may be admitted as evidence. Although the Supreme Court has debated some aspects of *Miranda* warnings, one basic rule still applies. A person arrested or held in custody must be clearly informed of four things before any of his testimony may be admitted into evidence: 91) the defendant has the right to remain silent; (2) anything he says may be used against him in court; (3) he has the right to consult with an attorney and to have an attorney present during interrogation; and (4) if he is indigent, a lawyer will be appointed to represent him. *United States v. Patane*, 124 S. Ct. 2620 (2004); *Dickerson v. United States*, 530 U.S. 428, 435 (2000); *Miranda v. Arizona*, 384 U.S. 436, 467-73 (1966). Although the right to the presence of an attorney includes the right to consultation with counsel both before and during questioning, *see Ducksworth v. Eagan*, 492 U.S. 195, 203 (1989) citations omitted), the warnings need not be given in the exact language provided in *Miranda*. *See Id.* at 202-04. The question is whether the warnings reasonably and effectively conveyed to a suspect his rights as required by *Miranda*. *Id.*

A suspect, however, may waive his right to remain silent. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). A waiver is voluntary if it is "the product of free and deliberate choice rather than intimidation, coercion or deception." *Id.* A waiver is knowing and intelligent if it is "made with a full awareness of both the nature and the right being abandoned and the consequences of the decision to abandon it." *Id.* When considering whether the right to an attorney has been waived, a court must consider the facts and

circumstances of the case, and "the background, experience and conduct of the accused." *North Carolina v. Butler*, 441 U.S. 369, 375-76 (1979). Although, the voluntariness of a defendant's confession, plea, or waiver is a legal question, the Ninth Circuit has held that a state court's determination of whether a waiver was knowing and intelligent is a factual question entitled to a presumption of correctness. *Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991) (en banc).

The conversations with Palm Springs police being challenged by Petitioner are the following. The Palm Springs police interviewed Brown on May 27, 1991. At the beginning of the interview, Detective Harvey informed Brown of his *Miranda* rights:

> **Harvey:** . . . basically, what I'll do is I'll tell you what your rights are and uh . . . I'd like to hear your side of this thing too. Basically you have the right to remain silent. Anything you say can and may be used against you in court. You have the right to an attorney and have him present while you're being questioned, and if you can't afford one, one will be appointed for you by the curt.
>
> **Brown:** All right.
>
> **Harvey:** Okay. Having those rights, all of those rights.
>
> **Brown:** Okay.
>
> **Harvey:** Are you will to talk?
>
> **Brown:** I'm willing to talk.
>
> **Harvey:** Are you willing to talk with us, Cal?
>
> **Brown:** Okay.

(SR 8609-8610)

The detectives conducted a second interview on May 27, 1991, and advised Brown of his *Miranda* rights again at the beginning of the interview:

> **Harvey:** I want to make sure you understand that I've advised you of your rights on their case too. You have the right to remain silent. Anything you cay can and may be used against you in court.
>
> **Brown:** Uhm hmmmm.
>
> **Harvey:** You have the right to an attorney and to have him present when you're being questioned. If you cannot afford one, one will be appointed for you.
>
> **Brown:** Uhm hmmm.
>
> **Harvey:** Do you understand those rights?
>
> **Brown:** I understand the rights.
>
> **Harvey:** Having those rights in mind, you're willing to talk to us.
>
> **Brown:** Yeah, at this time.

(SR 8661.)

A third interview was conducted the following day, May 28, 1991, and the police again advised Brown of his *Miranda* rights:

> **Harvey:** Okay. Cai we're here because you asked us to come in and before we talk to you, I go over your rights every time.
>
> **Brown:** Okay.
>
> **Harvey:** Okay. I know you know them and I know that I've told them to you before but I

just like – I like to do that.

Brown: Play it safe.

Harvey: Yeah, play it safe, so that everybody know what – you know, the court knows what's happening and no one says that we were in here trying to trick you or anything like that. Okay? Uhm . . . the jailer, Mr. Smith, the young guy came to use and said that you wanted to talk to us.

Brown: Right.

Harvey: Okay. Let me tell you what your rights are one more time then.

Brown: Go ahead.

Harvey: You have the right to remain silent. Anything you say can and may be used against you in court. You have the right to an attorney and to have him present when you're being questioned. If you cannot afford an attorney, one will be appointed for you if you desire.

Brown: Yeah.

Harvey: Do you understand your rights?

Brown: Right.

Harvey: Do you care to speak with us?

Brown: Right.

(SR 8690-8691)

Clearly Brown had a right to an attorney before questioning. In apprising Brown of his *Miranda* rights Detective Harvey did not *explicitly* inform him of this right. However, there is no

Supreme Court precedent requiring that police use the words "before being questioned" in advising a suspect of his right to an attorney. In fact the Supreme Court has stated that such an exact incantation is unnecessary, and indeed would be unworkable. *See Duckworth*, 492 U.S. at 202-04; *California v. Prysock*, 453 U.S. 355, 355-56 (1981). The Washington Supreme Court's determination that, based upon the totality of the warning, the warning was sufficient under *Miranda*, was not an unreasonable application of clearly established federal law, nor was it based upon an unreasonable determination of the facts as presented in the state court proceedings. Petitioner's fifth claim for relief must be denied.

Petitioner's Sixth Ground for Relief: Jury Selection

Petitioner argues in his sixth claim for relief that the jury was selected in violation of the Due Process Clause of the Fourteenth Amendment. Petitioner argued on appeal that the trial court's rulings permitted the exclusion of prospective jurors on a broader basis than that allowed under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and its progeny. The Washington Supreme Court found that the trial judge "did not abuse his discretion" in excluding jurors Denis, Henderson and Deal. *State v. Brown*, 940 P.2d at 601-04. Petitioner argues that this decision was contrary to, and an unreasonable application of, clearly established Federal law as established by the Supreme Court and was based on an unreasonable determination of the facts as presented in the state court proceedings.

Upon habeas review, determination as to

individual juror bias in both trial and capital sentencing juries, are factual questions entitled to the presumption of correctness. *Wainwright v. Witt*, 469 U.S. 412 (1985). *See also Darden v. Wainwright*, 477 U.S. 168, 175 (1986); *Patton v. Yount*, 467 U.S. 1025 (1984) (finding that impartiality of individual jurors is a question of fact). A petitioner must rebut such a finding by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The Sixth Amendment to the Constitution guarantees criminal defendants a trial by impartial, indifferent jurors. U.S. Const. amend. VI. A trial judge must exclude potential jurors who are unable to set aside their preconceptions and decide the case on the evidence presented in court. *Irwin v. Dawd*, 366 U.S. 717, 722-23 (1961). The standard for determining when the court may exclude a prospective juror because of his or her views on capital punishment "is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). A juror's bias need not be proved with "unmistakable clarity." *Id.* This standard is in contract to the one set forth in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The *Witherspoon* Court ruled that a judge could not exclude every potential juror with reservations about the death penalty. *Id.* at 521-23. Instead, the Court stated that a court may exclude only those extreme opponents who would vote against the capital punishment in all cases regardless of the evidence presented. *Id.* In *Adams v. Texas*, the Court provided a new formulation of the rule and stated

that a capital punishment opponent may not be challenged for cause unless his views would "prevent or substantially impair" his ability to carry out his duties as a juror. 448 U.S. 38, 45 (1980). In *Wainwright*, the Supreme Court confirmed the *Adams* formulation as the proper rule and clarified that the stricter standard set forth in *Witherspoon* is not the proper basis for excluding death-scrupled jurors. 469 U.S. at 424.

The facts related to Petitioner's sixth claim for relief are as follows. Jury selection began on October 27, 1993. (SR 2013.) At the beginning of the jury selection, each potential juror was asked to complete a written questionnaire. Jurors were questioned individually regarding their ability to follow the law in a possible second phase of the trial (death-qualification). (SR 2018.) The State challenged jurors Denis, Henderson, and Deal for cause based upon answers made to questions concerning their ability to impose a sentence of death. Brown objected to the Court excusing jurors Denis and Henderson. He did not object to the exclusion of Deal.

Juror Lisa Denis

Juror Denis completed a questionnaire privately and prior to any examination by the court or parties. Questions 60-63 made inquiry in general terms on the subject of the death penalty. She indicated that she had been raised as a Catholic and had been taught the death penalty was wrong. She admitted that while she had been influenced by the Church, she had not been swayed to the belief and remained "indecicive" [sic]. She further stated that she would require the "evidence" to be

"overpowering" (presumably on the question of guilt.

Upon individual questioning, Ms. Denis expressed "moral" reservation about the penalty of death. (SR 2315.) She "felt the taking of [human life] was wrong. It's just not right." (SR 2312-2313.) When asked if she could follow the court's instructions, Ms. Denis said, "Oh yea, I could follow the instructions. I think that – actually making that decision, no." (SR 2314.) Although Ms. Denis stated she thought she could put her emotions aside and follow the judge's instructions (*see* SR 2315), she also stated that it "definitely would be a sense of relief not to have to go to the death penalty." (SR 2320.) She said she could impose the death penalty only if the proof was "crystal clear." (SR 2320.) When asked specifically by the court, Ms. Denis indicated that she did not think she could vote to impose the death penalty. (SR 2323.) The State then challenged Ms. Denis for cause. The superior court found Ms. Denis "substantially impaired" in her ability to follow the court's instruction and granted the state's motion. (SR 2327-28.)

Juror Kristin Henderson

Juror Henderson, an attorney, was also excluded from the panel on the state's motion. In her initial questionnaire, she stated an opposition to the death penalty. In answer to questions during *voir dire* Ms. Henderson expressed a resentment about having to make a decision about the matter by virtue of having been called to jury service. (SR 2101.) She stated she had "some awfully strong feelings" on the death penalty. (SR 2104.) Ms. Henderson found the death penalty "barbaric." (SR 2104.) She was clear, however, that she would be able to "set aside [her]

resentment and [her] feelings about the death penalty," . . . "accept the law from the Court, consider the evidence that is presented in court, and make a decision, a reasoned decision under the law of the State of Washington." (SR 2103-04.) The State challenged Ms. Henderson for cause, and the superior court found that she was substantially impaired and excused her for cause. (SR 2112-2113.) Brown objected to the exclusion of Juror Henderson. (SR 2112.)

The court's ruling excluding Juror Henderson was the basis of a motion to recall her or strike the panel and being anew. (SR 6521.) The court denied the motion indicating that the decision to excuse Ms. Henderson as substantially impaired was based upon most convincingly "her body posture" . . . "the way she crossed her arms, and what she was telling us at that point in time." On November 29, 1993, the selected jurors were sworn to try the cause.

Juror Richard Deal

Juror Deal, in his questionnaire, state a "belief" in the death penalty. In answer to questions regarding his views, he indicated that the death penalty was appropriate in "severe" situations (SR 2199), such as when "a person is, would be incorrigible and would reviolate if released." (SR 2203-04.) He indicated that he could consider the options of life without parole and death, and could vote for a death sentence if he was "convinced that was the appropriate measure." (SR 2216.) Mr. Deal also indicated some confusion about the impact of a life sentence without parole and the standard of proof. Mr. Deal stated that he would only impose the death penalty if someone could kill again on parole,

and that the standard of proof was "beyond a shadow of a doubt" rather than "beyond a reasonable doubt." (SR 2211-18.) The State challenged Mr. Deal for cause and Brown did not object. (SR 2218-2219.)

The Washing Supreme Court found that the trial judge did not abuse his discretion in excluding jurors Denis, Henderson, and Deal. *State of Brown*, at 601-04. Applying the standard set forth in *Wainwright*, the Washington Supreme Court found that the trial court did not abuse its discretion in excusing Juror Denis for cause: "The record supports the court's finding that her views about the death penalty would have substantially impaired her ability to follow the court's instructions." *State v. Brown*, 940 P.2d at 585. The court made the same finding as to Juror Henderson "because her oral responses and body language showed she would be substantially impaired in performing her duties as a juror." *Id.* Finally, regarding Juror Deal, the court observed,

> Appellant did not object at trial to the State's challenge of Richard Deal for cause. At any rate, Mr. Deal was properly excused. On *voir dire* he indicated he would impose the death penalty where the defendant "would reviolate if released," which is not a correct statement of the law. He also misunderstood it to be "beyond a shadow of a doubt," although he was corrected later. The trial court did not abuse its discretion in excusing Mr. Deal for cause.

Id. These decisions were not contrary to, or an unreasonable application of, clearly established federal law as established by the Supreme Court. Both the trial court in excusing the jurors, and the

Washington Supreme Court is addressing Petitioner's claim of improper dismissal, applied *Wainwright*'s standard. There is sufficient evidence to establish that each juror's views would "prevent or substantially impair" his or her ability to carry out the duties imposed on jurors. Even if this Court would not have dismissed the jurors for cause, it cannot substitute its judgment for that of the state courts. The Washington Supreme Court's decision was not an unreasonable determination of the facts as presented in the state court proceeding. Petitioner's sixth ground for habeas relief must be denied.

Petitioner's Eighth Ground for Relief: Ineffective Assistance of Counsel

Petitioner argues that he was deprived of his Sixth Amendment right to the effective assistance of counsel at the sentencing phase of his trial. Since this claim was the subject of the November 4, 2003 Evidentiary Hearing, some discussion of what occurred at the sentencing phase is helpful.

The trial court appointed Lin-Marie Hupp, Terry L. Mulligan, and Kern W. Cleven as counsel to represent Brown in both the guilt and sentencing phases of his criminal trial. At sentencing, Petitioner sought to raise his alleged bipolar disorder as a mitigating factor under Wash. Rev. Code § 10.95.070. To avoid the death penalty, Petitioner needed to convince only one juror that the mitigating circumstances did not warrant a death sentence. Brown's primary mitigation argument was that he suffered from a form of mental illness for which he did not receive adequate treatment or supervision upon his release from Oregon State Prison, where he

was incarcerated prior to Ms. Washa's murder. Brown presented the testimony of Dr. Roland Maiuro, a clinical psychologist and associate professor at the University of Washington School of Medicine, to support his argument. Dr. Maiuro testified at the sentencing phase that Brown suffered from, among other things, manic syndrome, a disorder for which lithium is often prescribed. Dr. Maiuro added that when Brown was released from the Oregon State Prison, ingestion of lithium should have been a condition of his parole. Dr. Maiuro also testified that although lithium treatment was warranted, he could not prescribe it for the petitioner because he is not a medical doctor.

In preparation for the sentencing phase of the trial, Dr. Maiuro notified defense counsel that he was not a medical doctor and recommended that counsel contact Dr. John Brinkley, who was qualified in the area of lithium management and in prescribing medication. Defense counsel contacted Dr. Brinkley, but he ultimately decided to serve as the prosecution's witness in the sentencing phase. Defense counsel did not contact a similarly qualified expert.

At the sentencing phase of the trial, Dr. Brinkley testified that he saw no indication from the Oregon State Prison records that Brown suffered from a disorder for which lithium treatment was appropriate. Defense counsel made a tactical decision, after some internal disagreement, not to cross examine Dr. Brinkley. Instead of conducting a cross examination, defense counsel opted to counter Dr. Brinkley's testimony during the closing statement, which Brown alleges his counsel ultimately failed to do. In contrast, the prosecution

during its closing statement attacked Dr. Maiuro's conclusions, emphasizing that he was not licensed to prescribe lithium treatment. They honed in on his qualifications as a clinical psychologist to testify authoritatively about the effects of properly managed lithium treatment for someone suffering from bipolar disorder. The prosecution additionally attempted to discredit Dr. Maiuro by contrasting his testimony with Dr. Brinkley's testimony. Petitioner maintains that he was deprived of effective assistance of counsel at sentencing due to his trial counsel's failure to (1) cross examine Dr. Brinkley, (2) consult with and call a psychiatrist who was qualified to discuss lithium treatment, and (3) call as a witness Sally Schick, whose observations of Brown while he was incarcerated at the Oregon State Prison allegedly were critical to his claim that he suffered from a mood disorder at the time of his offense.

The Washington Supreme Court, in reviewing Petitioner's PRP, held:

> Petitioner cannot under this claim establish either deficient performance by his counsel or resulting prejudice. In the presentation of manic mood disorder as mitigating evidence, the focus is on the disorder and not on its treatment with lithium. Petitioner apparently claims that because his own witness, Dr. Maiuro, could not legally prescribe medication, his credibility as an expert was somehow impaired. Dr. Maiuro was eminently qualified to render an opinion whether Petitioner suffered from a mental illness which would have excused his violent behavior, he being the director of the Anger Management and Domestic Violence Program at Harborview

> Medical Center/Mental Health Center and Associate Professor in the Department of Psychiatry and Behavioral Sciences at the University of Washington School of Medicine. Petitioner cannot establish how additional corroborating testimony would have changed the result of the penalty phase of his trial.

In re PRP of Brown, 21 P.3d at 697-98. Again, upon federal habeas review this Court may only consider whether the state court decision was an unreasonable application of clearly established federal law as determined by the Supreme Court.

The Supreme Court specifically addressed the question of what standard to apply in judging whether a death sentence should be set aside due to ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). In holding that judicial scrutiny of counsel's performance must be highly deferential, the Court stated "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluation the conduct from counsel's perspective at the time." *Id.* at 689. The Court concluded that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular, *viewed as of the time of counsel's conduct*." *Id.* at 69 (emphasis added). The Court explicitly reiterated these guidelines in both *Williams v. Taylor*, 529 U.S. 362 (2000) and *Wiggins v. Smith*, 123 S.Ct. 2527 (2003). Additionally the Ninth Circuit has stated that an attorney's latter-day belief in his or her "own incompetence runs afoul of the rule of contemporary assessment." *Hendricks*

v. Calderon, 70 F.3d 1032, 1039 (9th Cir. 1995). The Court will address the two prongs under *Strickland* in turn.

Reasonableness

Clearly, counsel has a duty to investigation and present mitigating evidence. *See e.g.*, *Stankewitz v. Woodford*, 365 F.3d 706 (9th Cir. 2004). Trial counsel also has an obligation to conduct a thorough investigation of the defendant's background. *Williams*, 529 U.S. at 396 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980). However, the duty to investigate is not limitless and "does not necessarily require that every conceivable witness be interviewed. " *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 195). "[A] penalty phase ineffective assistance claim depends on the magnitude of the discrepancy between what counsel did investigate and present and what counsel could have investigated and presented." *Stankewitz*, 365 F.3d at 716. Moreover, "counsel's tactical decision at trial, such as refraining from cross-examining a particular witness or from asking a particular line of questions, are given great deference and must similarly meet only objectively reasonable standards." *Dows v. Wood*, 211 F.3d 480, 487 (9th Cir.), *cert. denied*, 531 U.S. 908 (2000). The burden is on Petitioner to overcome the presumption that counsel's action or omission was "sound trial strategy." *Strickland*, 466 U.S. at 689.

Two cases cited frequently by Petitioner can be distinguished at the outset. In *Williams v. Taylor*, the Supreme Court found counsel's representation during the sentencing phase fell below professional standards when counsel "did not begin to prepare for

that phase of the proceedings until a week before trial," and "failed to conduct an investigation that would have uncovered extensive records graphically describing petitioner's nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." 529 U.S. at 395. The court goes on to recount the childhood neglect and abuse suffered by Petitioner but never revealed to the jury, and to list all the available evidence that would have assisted counsel in his mitigation defense. *Id.* at 396. Similarly, in *Stankewitz v. Woodford*, the Ninth Circuit found that the evidence presented in mitigation mostly dealt with generic testimony about the "Power of God" to help persons change their lives. *Stankewitz*, 365 F.3d at 716. In a declaration, Stankewitz's defense counsel admitted that he conduct very little investigation into mitigating evidence and explained it was due in part to his client's purported opposition to a penalty phase defense, an explanation that was belied by the record. *Id.* at 721. These two cases involved a total absence of mitigating factors. Petitioner, on the other hand, argues about "net effect" and what defense counsel "could have done." In hindsight, it is always possible to say a defense that resulted in imposition of the death penalty could have been stronger, but that is very different from an argument that a criminal defendant lacked altogether a defense of mitigating factors. Therefore, the Court turns to weighing the magnitude of the discrepancy.

Defense counsel presented a substantial amount of mitigation evidence during the penalty phase of trial. Dr. Maiuro testified to the symptoms of manic syndrome. He testified that Brown was

severely impaired in his ability to regulate his behavior, and could not relate to people in any way except in unhealthy and violent fashion. He also opined that the Oregon prison system did not adequately monitor Brown's lithium usage. In addition to the testimony of Dr. Maiuro, the defense team called as a witness Dr. Cedoline, a school psychologist who counseled Brown. Dr. Cedoline testified that Brown displayed explosive temper outbursts, was socially isolated from other children and had poor self-esteem, that he suffered from Attention Deficit Hyperactivity Disorder as a child, and had made some process while in counseling before moving to another school in the eighth grade. Finally, the defense presented testimony from Brown's stepmother and two of Brown's aunts.

Turning to defense counsel's investigation, the Court notes that a tremendous amount of energy went into developing mitigation evidence. Defense counsel collected and presented at trial volumes of records related to Brown's social history and mental health history. They contacted members of Brown's family and interviewed or attempted to interview numerous potential fact and expert witnesses, including mental health professionals who had treated Brown. They created a several hundred page "life chronology" that detailed Brown's social and mental health history. Most of the information developed in the life chronology was presented at trial.

Defense counsel also attempted to find experts who would assist in Brown's defense, but their efforts were hampered by difficulty in obtaining adequate funding, and the limited pool of available experts willing to work on the case. They retained

Dr. Cripe, a neuropsychologist, who examined Brown for evidence of organic brain damage. Although he did not find any such damage, he recommended that a specialist in clinical psychology examine Brown. The team debated the benefits of a psychological evaluation as opposed to a psychiatric evaluation, and determined that a psychological evaluation would ultimately provide more evidence.

Defense counsel then retained the services of Dr. Maiuro, who reviewed Brown's social and mental health records, reviewed Dr. Cripe's test results, interviewed Dr. Cedoline, interviewed some of Brown's family members, interviewed Brown and gave Brown psychological tests. Dr. Maiuro diagnosed Brown as having an antisocial personality disorder, sexual sadism and manic syndrome. A short time prior to the start of trial Dr. Maiuro recommended the defense team contact Dr. Brinkley, which they did, only to learn that he had already been retained by the prosecution. The record shows that Mr. Cleven and Ms. Hupp had interviewed Dr. Brinkley prior to his testimony. Mr. Cleven had prepared a cross-examination of Dr. Brinkley. Although the defense team ultimately decided not to cross-examine Dr. Brinkley, there is no sign that defense counsel were deficient in their preparations.

In contrast, Petitioner argues that the following types of evidence should have been presented. First, the testimony of Sally Schick would have corroborated the testimony of Dr. Maiuro that Petitioner benefitted from lithium treatment while in prison. Second, cross-examination of Dr. Brinkley would have revealed that he failed to conduct a personal interview of the Petitioner and that he failed to review Petitioner's social history. Finally,

since defense counsel sought to present a defense that necessarily required the testimony of a psychiatrist, i.e. Petitioner suffered from a mood disorder that required treatment with a specific medication, defense counsels' representation fell below professional standards when they failed to retain such a witness. Dr. Scher, who testified so elegantly at the Evidentiary Hearing, would have been available to assist with this defense.

The Court finds that Petitioner has failed to bear the burden of rebutting the presumption that defense counsel's decisions about how to proceed during the sentencing phase conformed with professional standards. This finding is in keeping with Supreme Court precedent. *See e.g., Bell v. Cone*, 535 U.S. 685 (2002) (finding that it was not objectively unreasonable for state court to deem counsel's performance as involving tactical decisions about which competent lawyers might disagree where counsel had tactical reasons for not calling witnesses during sentencing phase); *Burger v. Kemp*, 483 U.S. 776 (1987) (holding counsel's strategic choice not to introduce any mitigating evidence even after a less than complete investigation was supported by reasonable professional judgment when the evidence that could have been presented would not have been helpful in establishing mitigation). The state court application of the reasonableness prong of the *Strickland* test was not contrary to established federal law, nor was it an unreasonable application of that law.

Prejudice

Petitioner argues that he suffered prejudice because case law shows that (1)mental illness can

affect a sentencing determination; and (2) the gruesome nature of the crime does not make it impossible to conclude any jury would impose death.

This Court is limited to reviewing the state court decision for the errors already described in the section discussing the standard of review for federal habeas petitions. The Washington State Supreme Court did not address the issue of prejudice because it found that trial counsel's performance was not deficient. *In re PRP of Brown*, 21 P.3d 687 (2001). However, even had the Washington Supreme Court discussed the issue, it is doubtful that it would have found prejudice. Habeas relief is appropriate where "[a]bsent the errors the sentencer independently weighing the evidence would have concluded the balance of aggravating and mitigating circumstances did not warrant death." *Stankewitz*, 365 F.3d at 723. In assessing prejudice, a court should reweigh the evidence in aggravation against the totality of available mitigating evidence. *Id.*

Any mitigating evidence would be presented against the overwhelming backdrop of the events leading up to Ms. Washa's murder, recounted in detail at the outset of this opinion. Add to that Petitioner's extensive criminal history, including prior convictions for (1) assault with a deadly weapon, (2) grand theft, (3) attempted assault in the first degree, (4) assault in the second degree, (5) attempted murder in the first degree, (6) aggravated mayhem, (7) torture, (8) false imprisonment, and (9) robbery in the first degree. The jury also heard evidence of the attempted murder of Ms. Schnell in California immediately following the murder of Ms. Washa in Washington. Petitioner's argument that mental illness can affect a sentencing decision turns

a blind eye to the fact that Dr. Brinkley had also determined that Brown was a sociopath. Although he disagreed that Brown suffered from a mood disorder, and therefore disagreed that a lithium treatment would have been appropriate, this did not discount the fact that the jury heard evidence of Petitioner's mental illness. In sum, the Court finds that the totality of the circumstances in this case do not raise a reasonable probability that the result of the sentencing proceeding would have been different if the three types of evidence propounded by Petitioner would have been presented. Petitioner's eighth ground for relief is denied.

Petitioner's Tenth Ground for Relief: Post-Conviction Relief

Petitioner asserts that the Washington procedures for seeking post-conviction relief, as administered by the Washington Supreme Court in this case, failed to comport with the minimum requirements of due process of law. Petitioner's PRP contained a claim that he was deprived of his Sixth Amendment right to effective assistance of counsel because trial counsel failed to obtain the opinion of a psychiatrist who could have confirmed the diagnosis of bipolar disorder and who could have confirmed Brown's need for monitored lithium. *In re PRP of Brown*, 21 P.3d at 700-1. During post-conviction proceedings, Brown filed a motion in the Washington Supreme Court for the appointment of a psychiatrist. The motion was denied. (SR 8341.) Petitioner also filed several other motions, including a motion for permission to take the deposition of Dr. Brinkley, one to take a documents deposition of the King County Superior Court Audit Committee records custodian, and a request for funds for the

appointment of a mitigation specialist. These motions were also denied. (SR 8205-8253, 8314, 8323-8337.) Respondent argues that this type of relief is not available on federal habeas review.

The Due Process Clause of the Fifth Amendment does not establish any right to collaterally attack a final judgment of conviction. *United States v. Maccollom*, 426 U.S. 317, 323 (1976); *See also Ohio Adult Parole Authority v. Woodard*, 118 S. Ct. 1244, 1250 (1998) (plurality opinion); *Murrary v. Giarratano*, 492 U.S. 1 (1989). Although there is arguably no explicit statement from the United States Supreme Court on whether federal habeas relief is available to redress alleged procedural errors in state post-conviction proceedings, there is ample valid caselaw supporting this approach to suggest the Supreme Court approves of the practice. *See Ortiz v. Stewart*, 149 F.3d 923, 923 (9th Cir. 1998); *cert. denied*, 526 U.S. 1123 (1999) ("Moreover, this court has specifically stated that federal habeas relief is not available to redress alleged procedural errors in state post-conviction proceedings."); *Millard v. Lynaugh*, 810 F.2d 1403, 1410 (5th Cir. 1987); *cert. denied*, 484 U.S. 838 (1987) (stating "[e]ven if there was some error in the state denial of a hearing before adjudicating petitioner guilty of abuse of the writ process, this would not entitle Petitioner to federal habeas corpus relief because the complaint is an attack on a proceeding collateral to the detention and not to the detention itself."). *See also Franzen v. Brinkman*, 877 F.2d 26 (9th Cir. 1989); *cert. denied*, 493 U.S. 1012 (1989); *Mitchell v. Wyrick*, 727 F.2d 773, 774 (8th Cir. 1984) (per curiam); *cert. denied*, 469 U.S. 823 (1984); *Kirby b. Dutton*, 794 F.2d 245,

247-48 (6th Cir. 1986). Accordingly, this Court concludes that Petitioner's tenth ground for relief cannot be addressed in federal habeas proceedings and must be denied.

CONCLUSION

For the aforementioned reasons, Petitioner's petitioner for writ of habeas corpus is hereby DENIED.

SO ORDERED this 15th day of September, 2004.

/s/John C. Coughenour

UNITED STATES DISTRICT JUDGE

FILED

July 24, 1997

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
Respondent	)	Number 61320-6
v.	)	En Banc
CAL COBURN BROWN,	)	Filed Jul 24 1997
Appellant	)	

SMITH, J. – Appellant Cal Coburn Brown upon direct review appeals his conviction and sentence for aggravated first degree murder. A jury in the King County Superior Court, after a finding of "guilty," determined he did not merit leniency. The trial court then on January 18, 1994 sentenced Appellant to death as required by statute. We affirm the conviction and sentence.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) Whether, under RCW 10.95, the capital punishment statue, (a) there was sufficient evidence to justify the affirmative finding by the jury that there were not sufficient mitigating circumstances to merit leniency; (b) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; (c) the sentence of death was brought about by passion or prejudice; or (d) the defendant was mentally retarded;

(2) Whether the proportionality review mandated by RCW 10.95.130 is void for vagueness under the Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 3 and 14 of the Washington Constitution;

(3) Whether statements made by prosecuting attorneys during the guilt and penalty phases of the trial constituted prosecutorial misconduct which denied Appellant a fair trial;

(4) Whether the trial court erred in admitting the testimony of Ms. Susan J. Schnell, surviving victim in a criminal encounter with Appellant in California;

(5) Whether the trial court erred in admitting the testimony of Ms. Jan M. Gray and Ms. Brieanna C. West, who had noncriminal encounters with Appellant in California and Washington;

(6) Whether Appellant was adequately advised of his *Miranda* rights before making statements to Palm Springs, California police detectives;

(7) Whether Appellant's statements to Palm Springs, California police, where were recorded without his knowledge as permitted by California law, violated Washington's Privacy Act, RCW 9.73, and thus were inadmissible in Washington courts;

(8) Whether there is before this court a record of "sufficient completeness" for adequate appellate review of the issues presented in Appellant's appeal:

(9) Whether the trial court erred in allowing prospective jurors to be "death qualified" during voir dire examination;

(10) Whether certain prospective jurors were properly excused for cause;

(11) Whether the terms "premeditation" and "intent" were sufficiently explained in the trial court's instructions to the jury;

(12) Whether the trial court properly instructed the jury concerning the aggravating factors in the case;

(13) Whether the trial court erred in refusing to give the jury certain instructions proposed by the defense in the penalty phase;

(14) Whether Appellant was properly served with the Notice of Special Sentencing Proceeding required by RCW 10.95.040(2);

(15) Whether Criminal Rule 4.7 (CrR 4.7) mandates reciprocal pretrial discovery of evidence relevant to the penalty phase in a capital case; and

(16) Whether the trial court erred in refusing to admit victim impact evidence in the penalty phase of the trial.

STATEMENT OF FACTS

On May 27, 1991, Memorial Day, King County police, following a telephone call from police detectives in Palm Springs, California, discovered the body of a twenty-one-year-old woman, Ms. Holly C. Washa, in the trunk of her 1985 blue Oldsmobile automobile parked in space 266 of a Budget Park and Ride lot near the Seattle-Tacoma Airport. She was wearing a leather jacket covered with blood, and the strap of her purse was tied and knotted tightly around her neck. The strap was sunken into the cavity of a deep slash wound across her neck.

The events surrounding Ms. Washa's death began on May 18, 1991 when the appellant in this case, Cal Coburn Brown, was in La Jolla, California at the Hyatt Regency Hotel. While in the hotel lounge, Appellant met Ms. Jan M. Gray from the Seattle area, who was in La Jolla with her mother on vacation. While socializing with Ms. Gray and her mother, Appellant told them he was an architect who built houses. He also told them he had trouble meeting single women. Ms. Gray mentioned that she had a single friend named Brieanna West who also lived in the Seattle area and who had similar problems meeting single men. After some coaxing by Appellant, Ms. Gray telephoned Ms. West and arranged a blind date for them in Seattle.

On May 20, 1991, Appellant traveled by air to Seattle. En route, there was a scheduled stop in Ontario, California, where Ms. Susan J. Schnell boarded for a business trip to Lewiston, Idaho. Appellant and Ms. Schnell, who were sitting near each other, began talking during the flight. She found him friendly and interesting. He told her he was a "home designer" and spoke with an Australian accent. He also told her he wanted to see her again. She gave him her home and business telephone numbers and the name of the hotel where she would be staying in Lewiston. That same evening Appellant met with Ms. Brieanna C. West for drinks at the Seattle-Tacoma Red Lion Inn. She found him physically unattractive and did not want to see him again. Appellant stayed at the Red Lion Inn that night and Ms. West returned to her apartment.

Appellant telephoned Ms. Susan J. Schnell in Idaho at 9:00 p.m. the next evening and asked her if she could spend some time with him in Seattle. She

told him she planned to fly back to California the next day, May 22, 1991, and would be in Seattle on a brief layover. She and Appellant made plans to meet at the Seattle-Tacoma Airport during her layover. Appellant then telephoned the Shadow Motel in the airport area and made arrangements to leave his luggage there. He told an employee of the motel he had met a woman and was going to fly to Palm Springs to meet with her again.

On May 22, 1991, Appellant met with Ms. Schnell at the Seattle-Tacoma Airport for dinner. They discussed getting together in Palm Springs for the upcoming Memorial Day weekend. Without making definite plans, Ms. Schnell took her flight back to Ontario, California. Later that evening, Appellant telephoned Ms. Schnell in California and arranged to spend Memorial Day weekend with her in Palm Springs.

Appellant's Statement to Police

On May 27 and 28, 1991, Appellant made statements to police detectives in Palm Springs, California in three interviews which were recorded without his knowledge. In his statements he related in calm, deliberate, clear, graphic and specific detail a narrative of his activities, with few questions from the detectives, who courteously allowed him to relate his story.[1] His statements may fairly be characterized as admissions or confessions.[2]

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[1] A critical issue in this appeal is admissibility of the audio tapes admitted as State's Ex. 89.

[2] *See* BLACK'S LAW DICTIONARY (6th ed. 1990): *Confession* ("A voluntary statement made by a person charged with the commission of a crime . . ., communicated to another person . . . [acknowledging oneself] to be guilty of the offense

On the morning of May 23, 1991, Ms. Holly C. Washa was at the Wyndham Garden Hotel near the Seattle-Tacoma Airport where she had just quit her part-time job. As she was driving out of the parking lot in her 1985 Oldsmobile, Appellant pointed to one of the tires on her automobile suggesting something was wrong. She stopped. Appellant then forced his way into her automobile, stuck a knife[3] in her face, and grabbed her by the hair. He demanded that she "drive or die," and began rummaging through her purse for money. Finding only a small amount of change, he looked at her checkbook. He then forced her to write a check for $350.00, the entire balance in her checking account. They went through the drive-up window at a Seafirst Bank in Federal Way and cashed the check. Then they went to the Seattle waterfront area where Appellant tied Ms. Washa's hands behind her back with her purse strap and forced her into passenger seat of her automobile. He asked her several questions concerning her schedule on a typical day, who her roommates were and what they did.[4] He then purchased some handcuffs at a gun shop while leaving Ms. Washa tied up in the

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charged, and [disclosing] the circumstances of the act or the share and participation [the person charged] had in it." BLACK'S at 296). *Admission* ("[T]he avowal of a fact or of circumstances from which guilt may be inferred, but only tending to prove the offense charged, and not amounting to a confession of guilt." BLACK'S at 48).

[3] The "knife" referred to throughout this narrative was actually an all purpose tool, with the brand name "Leatherman," which contained multiple folding implements, including a knife blade.

[4] Ex. 89, tape 1, side 2.

automobile.[5]

After purchasing the handcuffs, Appellant took Ms. Washa back to his room at the Shadow Motel where he paid for an extra night. He demanded that she remove all her clothing, after which he tied her to the bed with his neckties and her purse strap. He cut up her shirt and stuffed it into her mouth for a gag. He then ordered her to get dressed again and took her to get something to eat. While at a Burger King drive-through, he held the knife in a threatening position where she could see he might use it. Upon their return to the motel room, he ordered her to remove her clothing and lie face down on the bed. He also told her not to scream or do anything. Appellant said Ms. Washa began fellating him, which he took as her consent for sexual activity.[6]

Appellant then engaged in sexual intercourse with Ms. Washa for about two hours, during which time he noticed she was looking at the door and possibly thinking of escape. Appellant decided it was time "to have a little control . . make her a little more scared of me, basically." He then tied her in a face up, spread-eagle position, with her hands behind her back and her mouth gagged, and whipped her "maybe half a dozen times . . . ."[7]

Appellant allowed Ms. Washa to get dressed again, tied her hands behind her back, and drove her to Federal Way for pizza. When they returned to the motel, Appellant again forced her to undress and tied

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[5] Ex. 89, tape 2, side 1.

[6] Ex. 89, tape 1, side 2.

[7] Ex. 89, tape 2, side 1.

her to the bed in a face down, spread-eagle position with her hands tied behind her back. He then had sexual intercourse with her again. At about 11:00 p.m. that evening, he telephoned Ms. Susan J. Schnell in California to reconfirm their weekend plans in Palm Springs. After that, he crawled into bed with Ms. Washa, who was still bound and gagged and they "dozed."[8]

The next day, Friday, May 24, 1991, Appellant forced Ms. Washa to drive him to her apartment where he hoped to find checks belonging to her roommates that he could forge. He found some checks and attempted to cash them in $500.00 amounts, but was thwarted when the banks wanted to compare signatures with signature cards on file. Appellant became irritated with Ms. Washa when the check-cashing plan did not go as he had hoped. She began to drive somewhat erratically, making him even angrier.[9]

When they returned to the motel, Appellant again tied Ms. Washa to the bed face down in a spread-eagle position with her hands handcuffed behind her back and her mouth gagged with a washcloth. He penetrated her vaginally and anally with an aftershave lotion bottle.[10] He shaved her pubic hair and held a hot hair dryer close to her vagina, breasts and stomach. He also shocked her by using an electric extension cord with the end cut off. He described these acts as "torture" and acknowledged that the electric shock was

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[8] Ex. 89, tape 2, side 1.

[9] Ex. 89, tape 2, side 1.

[10] Ex. 89, tape 2, side 2.

particularly painful.[11]

At 8:45 on the evening of May 24, 1991, Appellant left for the Seattle-Tacoma Airport to embark on his trip to California. He forced Ms. Washa into the trunk of her blue 1985 Oldsmobile automobile with her hands hand-cuffed behind her back and drove to the Doug Fox Travel Agency parking lot where he momentarily parked the automobile. Because shuttle busses were driving around the lot, Appellant was concerned that someone might discover Ms. Washa since "she could just bang and clang and crunch and scream and be out very quickly."[12] He then went to the trunk and cut her throat with "three swipes" and stabbed her several times in the chest and abdominal areas.[13] Because Ms. Washa's blood began leaking from the trunk of the automobile, Appellant moved from the Doug Fox lot to the Budget Park and Ride lot near Shumsky's Restaurant in the airport area. He told detectives:

> I was going to do her at one place and leave here there and the blood started coming out from underneath the car . . . . So I panicked and left that place and drove around to a different place . . . with all the rain and stuff it would just wash away and it wouldn't show.[14]

Appellant told detectives he killed Ms. Washa because he did not want to leave any witnesses alive. He also told them he kidnapped her because he

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[11]Ex. 89, tape 1, side 2.

[12] Ex. 89, tape 2, side 1.

[13] Ex. 89, tape 3, side 1.

[14] Ex. 89, tape 1, side 2.

needed money to get to California and "didn't like the idea of waltzing into a bank with my face, you know, all over the place." He also stated he was "going to rob somebody and let 'em go but then I just realized . . . after I did it that it would just be the same as waltzing into a bank and have my picture taken."[15]

Appellant also told his Oregon parole officer, Larry Wibbenmeyer, in a telephone conversation on May 28, 1991 that he took Ms. Washa's life at the last minute. He described his actions as resulting from "panic."

Events in California

Appellant telephoned Ms. Susan J. Schnell from the airplane while en route to California to confirm the time he would meet her at a hotel near the Ontario Airport. Upon arrival there he had some drinks and later checked into a hotel. Appellant and Ms. Schnell met at about noon the next day, Saturday, May 25, 1991, and drove in her sports car to Palm Springs where they checked into a Ramada Inn. They had planned to stay in separate bedrooms, but because of a reservation mix-up, they had to stay in the same room with only one bed. They slept in the bed that night but did not have intercourse.

Appellant and Ms. Schnell spent Sunday, May 26, 1991, touring the Palm Springs area together. She was driving her burgundy red 1981 Corvette sports car. Upon returning from dinner around midnight, they began kissing and fondling. Appellant performed cunnilingus on Ms. Schnell and then offered to give her a back rub. Appellant straddled her while she lay face down on the bed.

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[15] Ex. 89, tape 1, side 2.

Suddenly he violently jerked her arms back and told her not to scream. When she did, he slit her throat. As she continued to scream, Appellant restrained her with handcuffs and brought the knife around to her chest and threatened her with it. She saw the knife. He told her he just wanted her money. Appellant repositioned Ms. Schnell on the bed and tied her to it, using her pantyhose. He shaved her pubic hair and raped her vaginally and orally. He then ordered her to write him a check for $4,000.00, which she had difficulty completing to his satisfaction until her third attempt.

Appellant became concerned about Ms. Schnell's bleeding and told her he was going out for medical supplies. He tried to gag her with a sock and restrain her arms above her head, but abandoned the effort when she began coughing up blood. Her feet, however, remained handcuffed to the bed. While he was gone, she was somehow able to reach the telephone and call the desk clerk. Palm Springs police arrived and took a description of Appellant from Ms. Schnell.[16]

When Palm Springs police officer Glen Haas saw a man who fit Appellant's description in the hotel parking lot, near a red Corvette sports car, he drew his firearm and told him to stop and put his hands up. Appellant identified himself as "Cal." Officer Haas asked him where the knife was, and Appellant responded "in my right front pocket." When asked his last name, Appellant replied "Brown." Officer Haas then arrested Appellant on

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[16] She was taken to the hospital for emergency surgery. She survived and testified as a witness in the King County trial.

suspicion of attempted murder.

After being processed by the Palm Springs police, Appellant was interviewed by Detective Mark Harvey and his partner, Detective Al Franz. Three interviews took place between May 27 and May 28, 1991, with the first two initiated by the detectives and the third initiated by Appellant. Before each interview, Appellant was read his *Miranda* rights, stated he understood them, and agreed to talk with the detectives. Each interview was tape-recorded without Appellant's knowledge or consent. During the first interview, Appellant in specific detail admitted his attack upon Ms. Schnell. Later in that interview, he admitted killing Ms. Washa before coming to Palm Springs. He told the detectives where the killing took place in Washington and where Ms. Washa's automobile could be found. The Palm Springs police immediately contacted King County police who dispatched local officers to the Budget parking lot near the Seattle-Tacoma Airport where they located the 1985 blue Oldsmobile in space 266 with Ms. Washa's body in the trunk. Appellant still had the keys to Ms. Washa's automobile in his possession.

Based upon his behavior with Ms. Schnell, Appellant pleaded "guilty" in California to attempted murder in the first degree, aggravated mayhem, torture, robbery in the first degree, and false imprisonment. On November 26, 1991 he was sentenced to life imprisonment in that state.

Corroborating Evidence

King County Medical Examiner Donald T. Reay, M.D., performed an autopsy on Ms. Holly C. Washa. He concluded her death was caused by an

extensive incised wound to her neck and strangulation by a ligature with a very rigid knot. He also noted that both stabbing and slicing occurred in the throat, requiring at least two motions to inflict the incised wound. It was his opinion that the hemorrhages in her eyes indicated the strangulation occurred first.

In addition to the lethal injuries, Dr. Reay described other trauma to Ms. Washa's body. Her pubic hair had been shaved. Her face was severely bruised. Both the inside and outside of her vaginal area was bruised. There was also bruising around her anus. The vaginal and anal injuries indicated forcible penetration with a hard object consistent with an aftershave bottle belonging to Appellant found in his Palm Springs hotel room. Her nipples showed abrasions and a linear pattern of bruising consistent with being whipped by a belt or cord. Similar bruising was found on her inner thigh, which also indicated whipping. Her feet and ankles were covered with bruises consistent with having been restrained. Her chest and abdomen had multiple stab and slicing wounds. An "irregular blemish-like area of red drying" on her inner thigh indicated burning. The stab wounds were consistent with the knife blade of the Leatherman tool Appellant had in his pocket when he was arrested.[17]

Appellant was charged by information on June 11, 1991 in the King County Superior Court with aggravated murder in the first degree. He was arraigned on February 26, 1992. A notice to determine whether the death penalty should be

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[17] The State also presented corroborating witness testimony and physical evidence. *See* Br. Of Resp't at 24-27.

imposed was filed on March 24, 1992. He was tried by jury before the Honorable Ricardo S. Martinez. The trial began with jury selection on October 25, 1993. Guilt phase testimony began on November 30, 1993. On December 10, 1993, the jury returned a verdict of "guilty" of premeditated murder in the first degree, finding that Appellant committed the murder to conceal commission of a crime or to protect or conceal his identity; and found aggravating circumstances of robbery in the first or second degree, rape in the first or second degree and kidnapping in the first degree. The penalty phase of the trial began on December 15, 1993, and on December 27, 1993, the jury returned a verdict finding there were not sufficient mitigating circumstances to merit leniency. The trial court on January 28, 1994 imposed upon Appellant a sentence of death.

DISCUSSION

STATUTORY REVIEW

(1) Whether, under RCW 10.95, the capital punishment statute, (a) there was sufficient evidence to justify the affirmative finding by the jury that there were not sufficient mitigating circumstances to merit leniency; (b) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; (c) the sentence of death was brought about the passion or prejudice; or (d) the defendant was mentally retarded.

(2) Whether the proportionality review mandated by RCW 10.95.130 is void for vagueness under the Eighth and Fourteenth

Amendments to the United States Constitution and Article I, §§ 3 and 14 of the Washington Constitution.

Under our capital punishment statue, RCW 10.95, this court must review a death sentence imposed by a trial court to determine (a) whether there was sufficient evidence to justify the affirmative finding by the jury that there were not sufficient mitigating circumstances to merit leniency; (b) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; (c) whether the sentence of death was brought about by passion or prejudice; and (d) whether the defendant was mentally retarded.[18] This review is in addition to the basic review on appeal.[19]

Sufficiency of the Evidence

[1] In the sentencing phase the jury in this case concluded the State had proved beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency for Appellant Brown.[20] In deciding whether there is sufficient evidence to support that conclusion, this court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found sufficient evidence to justify that conclusion beyond a reasonable doubt.[21]

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[18] RCW 10.95.130(2)(a), (b), (c), and (d).

[19] RCW 10.95.130(1).

[20] Clerk's Papers at 1594 (Verdict Form).

[21] *State v. Pirtle*, 127 Wn.2d 628, 682, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996).

At the penalty phase of his trial, Appellant offered mitigating evidence for the jury to consider in determining his sentence. He presented the testimony of family members who observed that Appellant's mother did not appropriately bond with or "attach" to him as an infant and seemed frustrated and impatient when interacting with him.[22] There was testimony that Appellant suffered a traumatic birth experience,[23] appeared "agitated" as an infant, and began to display behavior characterized as "out of bounds" by the age of two or three.[24] As Appellant grew, his difficult behavior had the effect of putting people off, causing them to reject and avoid him.[25] Testimony was also offered concerning his mother's five marriages,[26] the second of which reportedly involved physical and psychological abuse of both Appellant and his mother.[27] The main focus of Appellant's mitigating evidence was testimony by psychologist Dr. Roland D. Maiuro, Ph.D., who diagnosed Appellant as suffering from antisocial personality disorder, sexual sadism, and manic syndrome.[28] Dr. Maiuro was of the opinion that Appellant also suffered from attention deficit disorder and conduct disorder as a child,[29] perhaps as a result of the trauma he suffered

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[22] Report of Proceedings at 31-32, Dec. 16, 1993.

[23] Report of Proceedings at 24, Dec. 17, 1993. Appellant was born April 16, 1953.

[24] Report of Proceedings at 31, 33, Dec. 16, 1993.

[25] *Id.* at 32-36.

[26] *Id.* at 127-29.

[27] Report of Proceedings at 25-27, Dec. 17, 1993.

[28] *Id.* at 30.

[29] *Id.*

at birth.[30] He also testified that records of lithium therapy while Appellant was in prison in Oregon indicated the drug produced some progress in stabilizing his manic mood disorder, but concluded the state of Oregon did not adequately monitor Appellant's continued use of lithium after he was paroled.[31]

Viewing all the evidence in a light most favorable to the prosecution, a rational trier of fact could have found sufficient evidence to support the jury's conclusion that leniency was not merited in this case. The jury could well have discounted evidence of Appellant's difficult childhood and troubled family life as mitigating factors. Appellant raped, tortured and murdered twenty-one-year-old Holly Washa. Considering such a heinous crime, a rational trier of fact could have concluded that a difficult childhood and troubled family life, faced by many persons who do not resort to criminal behavior, did not constitute sufficient mitigation to deserve leniency in this capital case.

The State offered rebuttal testimony of a psychiatrist, Dr. John R. Brinkley, M.D., who concluded that Appellant does not suffer from organic brain damage.[32] The jury could rationally have believed this testimony, which tended to rebut Appellant's suggestion that his behavioral problems can at least partially be explained by his birth trauma. Dr. Brinkley also testified, based upon his

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[30] *Id.* at 67.

[31] Report of Proceedings at 43-44, Dec. 20, 1993; Report of Proceedings at 70, Dec. 17, 1993.

[32] Report of Proceedings at 110-13, Dec. 21, 1993.

review of Appellant's Oregon prison records, that lithium did not seem to effectively alter Appellant's behavior and concluded he would not have prescribed lithium in Appellant's case.[33] The jury could have rationally believed this testimony as well and discounted as a mitigating factor Appellant's assertion of irresponsibility on the part of the state of Oregon in monitoring his continued use of lithium. In any event, Appellant makes no persuasive argument that any inadequacy on the part of the State of Oregon in monitoring his drug therapy–which is his personal responsibility–mitigates in favor of leniency. The jury doubtless discounted Appellant's diagnosed personality disorders, since those disorders perhaps explained, but did not excuse, his violent behavior.[34]

[2] "The mere presence of mitigating factors does not require that the jury grant leniency, if the jurors are convinced that the circumstances of the crime outweigh the mitigating facts."[35] The jury in this case could reasonably have determined that none of the mitigating factors presented by Appellant were relatively persuasive against Appellant's brutal and tortuous treatment of Ms. Holly C. Washa. Under these circumstances, we conclude there was

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[33] *Id.* at 102-10.

[34] *See State v. Lord*, 117 Wn.2d 829, 906, 822 P.2d 177 (1991) (upholding under RCW 10.95.130(2)(a) a jury's finding that antisocial personality disorder did not mitigate in favor of leniency for a capital appellant, noting that the disorder explained, but did not excuse, appellant's behavior), *cert. denied*, 506 U.S. 856 (1992); *see also State v. Dodd*, 120 Wn.2d 1, 25, 838 P.2d 86 (1992) (diagnosis of severe pedophilia did not merit leniency under RCW 10.95.130(2)(a)).

[35] *Dodd*, 120 Wn.2d at 25.

sufficient evidence to support the determination by the jury that leniency was not merited in this case.

Proportionality

Under RCW 10.95.130(2)(b), this court must conduct a proportionality review to determine:

> Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120[.]

RCW 10.95.120 requires filing of reports "[i]n all cases in which a person is convicted of aggravated first degree murder." This pool of similar cases includes those in which the death penalty was sought and those in which it was not.[36]

Appellant argues that the proportionality review mandated by RCW 10.95.130 is void for vagueness under the Eighth and Fourteenth Amendments to the United States Constitution.[37] He cites in support of this claim the case of *Harris ex rel. Ramseyer v. Blodgett*, in which the United States District Court for the Western District of

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[36] *Lord*, 117 Wn.2d at 907.

[37] Br. Of Appellant at 174.

Washington held that Washington's proportionality review violates procedural due process because RCW 10.95.130 "does not establish adequate standards or guidelines on which the Court or the parties can rely."[38] However, as the State correctly points out, this court considered and rejected that argument in *State v. Brett*[39] and in *State v. Pirtle*.[40] Appellant Brown has not convinced us we should reexamine the issue in this case.

[3] In conducting proportionality review the court is principally concerned with avoiding two systemic problems associated with imposition of capital punishment: random arbitrariness and imposition of the death sentence in a racially discriminatory manner.[41] "Technical inconsistencies in a line-by-line comparison cannot be equated with those core concerns."[42] The focus in this case is on random arbitrariness. There is no claim of racial discrimination.[43]

[4, 5] Proportionality review under RCW 10.95 does not guarantee there will be no variations from case to case, nor that a sentenced of death will

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[38] *Harris ex rel. Ramseyer v. Blodgett*, 853 F. Supp. 1239, 1288 (W.D. Wash. 1994), *aff'd*, *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995).

[39] *State v. Brett*, 126 Wn.2d 136, 207-09, 212, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996).

[40] *Pirtle*, 127 Wn.2d at 683 (citing *Brett*).

[41] *State v. Gentry*, 125 Wn.2d 570, 655, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995).

[42] *Lord*, 117 Wn.2d at 910 (citing *Pulley v. Harris*, 465 U.S. 37, 54, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984)).

[43] Both the appellant and the victim in this case are Caucasian.

be uniformly imposed in all *superficially* similar circumstances.[44] Mathematical precision is unworkable[45] and unnecessary. "There is no constitutional or statutory requirement to ensure an unattainable degree of identity among particular cases which are invariably unique."[46] Instead, we must determine whether a death sentence has been imposed *generally* in similar cases, and not imposed *wantonly* and *freakishly*.[47] We have explored in prior cases the most effective way to reach this determination.[48]

Under the proportionality statute, RCW 10.95.130(2)(b), this court must consider both "the crime and the defendant" in examining "similar cases."[49] In carrying this out, we examine four factors: (1) the nature of the crime, (2) the aggravating circumstances, (3) the defendant's criminal history and (4) the defendant's personal history.[50]

(1) Nature of the Crime

The nature of the crime committed by Appellant Brown was particularly brutal. He

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[44] *Lord*, 117 Wn.2d at 910.

[45] *Id.*

[46] *Brett*, 126 Wn.2d at 213.

[47] *State v. Harris*, 106 Wn.2d 784, 798, 725 P.2d 975 (1986), *cert. denied sub nom. Harris v. Washington*, 480 U.S. 940, 94 L. Ed. 2d 781, 107 S. Ct. 1592 (1987).

[48] *Compare Lord*, 117 Wn.2d at 911 (suggesting a "family resemblances" approach) with *State v. Benn*, 120 Wn.2d 631, 680-693 (suggesting a statistically based approach).

[49] RCW 10.95.130(2)(b).

[50] *Pirtle*, 127 Wn.2d at 686.

kidnapped Ms. Holly C. Washa and robbed, raped and tortured her over a two-day period before killing her. He repeatedly raped her vaginally after he gagged and tied her to a bed in his motel room. At one point he used an aftershave bottle to rape her anally and vaginally. He whipped her naked body with a belt several times. He burned her on various parts of her naked body with a hot hair dryer. He shocked her on various parts of her naked body with the exposed end of an electric extension cord, which he acknowledged was quite painful. Appellant himself described these acts as "torture," explaining that he wanted to gain control over Ms. Washa through intimidation. He strangled her, stabbed her, cut her throat with "three swipes" and left her to die in the trunk of her automobile. She was found dead.

Comparing the facts of this case with "similar cases" reported reveals the nature of this crime is at least as brutal and callous as any other considered by this court. A case fairly comparable to this one is *State v. Dodd*, in which we upheld imposition of the death penalty after proportionality review under RCW 10.95.130(2)(b).[51] In conducting review in that case, the court considered the "extraordinarily vicious and cold-blooded manner" in which the appellant killed his victims, noting that two of them suffered for a significant time before their deaths.[52] Although the *Dodd* case involved three victims instead of one, it also involved physical and mental torture of one of the victims over a prolonged period before death, in a manner similar to the torture inflicted upon Ms. Washa. The victim in *Dodd*, a

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[51] *Pirtle*, 127 Wn.2d at 686.

[52] *Dodd*, 120 Wn.2d at 27.

four-year-old child, was raped and strangled over the court of an entire day, evening, and subsequent morning before he was killed.[53] Ms. Washa's ordeal lasted two days.

In *State v. Gentry*, this court found the death penalty was not disproportionate where the victim experienced terror while being chased through a wooded area before she was sexually assaulted and bludgeoned to death with a rock.[54] While the duration of the victim's suffering in *Gentry* was unknown,[55] the record in this case indicates Ms. Washa experienced substantial pain and terror for almost two days before she was killed by Appellant Brown.

[6] comparing Ms. Washa's suffering to that endured by victims in other cases considered by this court shows that Appellant's crime is at least as vicious as those committed in other cases in which we upheld imposition of the death penalty after proportionality review.[56] "A brutal murder involving substantial conscious suffering of the victim makes

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[53] *Id.* at 8.

[54] *Gentry*, 125 Wn.2d at 657-58.

[55] *Id.* at 657.

[56] *See, e.g.*, Report of the Trial Judge, *State v. Rupe*, No. 81-1-00316-1 (Thurston County Super. Ct. June 7, 1983) (single gunshot wound to head of the victims; no torture); Report of the Trial Judge, *State v. Jeffries*, No. 6488 (Clallam County Super. Ct. Nov. 18, 1983) (multiple gunshot wounds; no torture); Report of the Trial Judge, *State v. Benn*, No. 88-1-01280-8 (Pierce County Super. Ct. June 12, 1990) (gunshot wound to the head of the victims; no torture); Report of the Trial Judge, *State v. Harris*, No. 84-1-01190-6 (Pierce County Super. Ct. Jan. 14, 1985) (gunshot wound to the head and neck of the victim; contract killing; no torture).

the murderer more deserving of the death penalty."[57]

(2) Aggravating Circumstances

[7] The jury found Appellant "guilty" of premeditated first-degree murder, specifying four aggravating facts. It found he committed the murder of Ms. Washa (1) to protect or conceal his identity; (2) in the course of, in furtherance of, or in immediate flight from robbery in the first or second degree; (3) in the course of, in furtherance of, or in immediate flight from rape in the first or second degree; and (4) in the course of, in furtherance of, or in immediate flight from kidnapping in the first degree.[58] Only one aggravating factor is needed for imposition of the death penalty unless the person charged is found to be mentally retarded.[59] There is absolutely no suggestion in the record that Appellant was retarded. He has tested in the gifted intelligence range (an IQ of 144). The aggravating factors found by the jury in this case sufficiently support our conclusion that Appellant's sentence of death is not disproportionate when compared to other cases in which the death penalty was imposed.[60]

(3) Criminal History

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[57] *Gentry*, 125 Wn.2d at 657.

[58] Clerk's Papers at 1451-52 (Special Verdict Form B).

[59] RCW 10.95.030(2).

[60] *See, e.g.*, Report of the Trial Judge, *State v. Gentry*, (one aggravating factor: concealment of identity); Report of the Trial Judge, *State v. Benn* (one aggravating factor: multiple victims); Report of the Trial Judge, *State v. Harris* (one aggravating factor: contract murder); Report of the Trial Judge, *State v. Jeffries* (two aggravating factors: multiple victims, concealment of a crime).

Appellant's death sentence is not disproportionate when his criminal history is considered. His record includes prior convictions for (1) assault with a deadly weapon, (2) grand theft, (3) attempted assault in the first degree, (4) assault in the second degree, (5) attempted murder in the first degree, (6) aggravated mayhem, (7) torture, (8) false imprisonment, and (9) robbery in the first degree.[61] His criminal record shows a history of violence towards others. His criminal history is comparatively more extensive than that of other appellants who received the death penalty.[62]

(4) Personal History

[8] The subjective factors in Appellant's personal history are not sufficient to override the circumstances and consequences of his crime. "The role of mitigation evidence is to reduce culpability for a crime that has already been proved."[63] Appellant's mitigation evidence ranged from testimony about his troubled and sometimes abusive family lift to medical testimony concerning his diagnosed personality disorders.[64] Although commonly asserted, a history of abuse as a child seldom affects

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[61] Report of the Trial Judge, *State v. Brown*; Report of Proceedings at 45-46, Dec. 15, 1993.

[62] *See* Report of the Trial Judge, *State v. Rupe* (no prior criminal convictions); Report of the Trial Judge, *State v. Harris* (two prior convictions: assault, manslaughter); Report of the Trial Judge, *State v. Benn* (many misdemeanors and three prior convictions: first degree theft, grand larceny, first degree theft).

[63] *Pirtle*, 127 Wn.2d at 688.

[64] For a more detailed and thorough description of Appellant's mitigation evidence, see the discussion on "Sufficiency of the Evidence," *supra* at 591.

the outcome of aggravated first degree murder cases.[65] Also, we have upheld death sentences imposed on appellants with medically diagnosed personality disorders similar to, or more severe than, Appellant's.[66]

Conclusion on Proportionality

Appellant's death sentence is not disproportionate to sentences imposed in similar cases. The factors employed by this court in considering both the "crime and the defendant" justify our conclusion that Appellant Brown's case is sufficiently similar to other cases in which the death penalty has been imposed and upheld on appeal. The nature of his crime is a brutal and heinous as any considered by this court. His criminal history is extensive and shows a pattern of violence towards others. The jury found numerous aggravating factors in convicting him of aggravated first degree murder. His mitigating evidence was doubtless not sufficient to convince the jury that he merited leniency, the consequence being that he would be sentenced to death. Under these circumstances, we conclude the death sentence imposed upon Appellant Brown was not disproportionate to the crime committed and that it was not wantonly and freakishly imposed.

Passion or Prejudice

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[65] *Pirtle*, 127 Wn.2d at 688.

[66] *See, e.g., Dodd*, 120 Wn.2d at 11 (severe homosexual pedophilia); *Lord*, 117 Wn.2d at 906 (antisocial personality disorder); *State v. Rice*, 110 Wn.2d 577, 592-96, 757 P.2d 889 (1988) (evidence presented of "deep personality disorder and disordered childhood," but "no evidence of any organic central nervous system disease or intracranial abnormalities.").

Appellant Brown presents no independent argument that his sentence was the result of passion or prejudice. He claims only "the jury was not properly advised of the 'crime' it was asked to weigh against the mitigating factors," and that the jury was not instructed "that the deterrence of others, the cost of incarceration, and the purely emotional response to . . . the heinousness of the crime or the evil of the defendant should not be part of the weighing process."[67] From this Appellant somehow concludes the jury based its sentence upon an unfavorable emotional response to him and not upon reason.[68] There is no evidence in the record to support that claim. We therefore conclude the jury's verdict in the sentencing phase was not based upon passion or prejudice.

Mental Retardation

RCW 10.95.030(2) proscribes imposition of capital punishment upon persons who were mentally retarded at the time they committed the crimes for which they are being sentenced. To be considered "mentally retarded" under the statute a person must have, among other things, "significantly subaverage general intellectual functioning," which is defined as achieving an IQ of 70 or below.[69] Appellant does not claim he is mentally retarded. Nor is there even the slightest evidence to support such a claim. To the contrary, the record shows he had a measured IQ of 144 in the seventh or eighth grade, placing him at a

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[67] Br. of Appellant at 179.

[68] *Id.*

[69] RCW 10.95.030(2)(a), (c).

gifted level of intelligence.[70]

PROSECUTORIAL MISCONDUCT

(3) Whether statements made by prosecuting attorneys during the guilt and penalty phases of the trial constituted prosecutorial misconduct which denied Appellant a fair trial.

[9, 10] Appellant claims the prosecuting attorney engaged in prosecutorial misconduct which deprived him of a fair trial. He cites instances in which he claims the prosecutor made personal or emotional appeals to the jury. Where prosecutorial misconduct is claimed, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect.[71] To establish prejudice, the defense must demonstrate there is a substantial likelihood the misconduct affected the jury's verdict.[72]

[11-13] A prosecuting attorney's allegedly improper remarks must be reviewed in the contest of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.[73] Failure to object to an improper comment constitutes waiver of error unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative

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[70] Report of Proceedings at 114, Dec. 20, 1993.

[71] *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

[72] *Pirtle*, 127 Wn.2d at 672.

[73] *Russell*, 125 Wn2d at 85-86.

instruction to the jury.[74] "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request."[75]

Opening Statement (Guilt Phase)

Appellant first complains of two statements made by the prosecuting attorney during the State's opening statement in the guilt phase of the trial. In suggesting the jury could come to know the deceased Ms. Holly C. Washa only through the testimony of witnesses, the prosecutor stated:

> I've sort of lived with Holly [Washa] over the last two years or so preparing for this case, and perhaps I've personalized her a little bit. Maybe by the time this trial is over, you will know enough about her that maybe you'll personalize her a little bit. The one thing I do hope though is that justice can be done by the end of this trial and we can put Holly [Washa] to rest.

The defense did not object to this statement.

Near conclusion of the State's opening statement, the prosecutor stated:

> I want to assure you at the end of this case you're not going to look at me and say, "Did he do it?" I suggest you're going to look at me and you're going to say, "How could he have done it?" And, you know, that's one question that I won't be able to answer for you. I don't have to answer it for you. I can't imagine how any person could have done this to Holly

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[74] *Id.* at 86.

[75] *Id.* at 85.

> Washa or to any other living human being. How could he have done it?

The defense did not object to this comment.

Upon conclusion of its opening statement, the defense moved for a mistrial based upon the prosecuting attorney's personalized and emotional appeal to the jury in his opening statement. The defense in the alternative requested a remedial instruction to the jury. The trial court denied the motion for mistrial, but did instruct the jury that "counsels' opinions, statements, whatever else they say in openings are certainly not evidence."

[14, 15] Denial of a motion for mistrial for alleged prosecutorial misconduct lies within the sound discretion of the trial court.[76] This court will not disturb that decision absent an abuse of discretion.[77] Here, the trial court did not abuse its discretion because the prosecutor's statements were not improper. Even assuming they might have been improper, there was no prejudice to Appellant. Besides, the court timely instructed the jury it was not to consider counsel's opinions or statements as evidence.

[16] Appellant has not sustained his burden of establishing that either of the statements were improper. The first statement was introductory in nature and focused on the prosecutor's preparation for trial. The second statement merely informed the jury what the state's evidence was expected to show. There is no indication either statement was made to elicit an emotional response from the jury. Neither

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[76] *Id.* at 86.

[77] *Id.*

was improper.

[17. 18] Assuming the two statements might have been improper, Appellant has not established he was prejudiced by either of them. The context in which they were made demonstrates that Appellant suffered no prejudice which would have affected the jury's verdict. The trial court properly instructed the jury that remarks by counsel in opening statements were not evidence. In fact, the defense made similar remarks in *its* opening statement. Defense counsel told the jury that remarks by counsel in opening statements were not evidence. In fact, the defense counsel told the jury that "like the [prosecution] has personalized this case for a couple of years with Holly Washa, we have done so with Mr. Brown . . . ." Defense counsel also stated in the jury's presence that Appellant's killing of Ms. Washa was "incredibly horrible, brutal and bizarre" and asked the jury how any person could be so "twisted, so full of bottled up rage to commit this type of crime." Appellant now claims error by the State for less provocative statements than those made by his own counsel in opening statement. This weakens the claim the remarks of the prosecutor were prejudicial and resulted in denial of a fair trial for Appellant.[78]

Closing Argument (Guilt Phase)

Appellant Brown next takes issue with two statements made by the prosecuting attorney during closing argument in the guilt phase of the trial.

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[78] *See Russell*, 125 Wn.2d at 89 (incorporation of improper statements made by prosecuting attorney into defense argument weakened defendant's contention the statements denied him a fair trial).

The first statement was made near the beginning of the State's closing argument when the prosecutor referred to Appellant's motive for murdering Ms. Washa: "He saw Holly Washa as a vehicle for getting cash so that he could get to Susan Schnell." The trial court overruled a defense objection.

The second statement was made later in closing argument when the prosecuting attorney was urging the jury to reject the lesser included offense of murder in the second degree. The prosecutor asked the jury not to "negotiate" with Appellant:

> The defendant does not deserve a compromise. You should not negotiate with Cal Brown. You should not even think about negotiating with Cal Brown. Cal Brown didn't allow Holly Washa to negotiate with him. She didn't get to negotiate for her life. She didn't get to negotiate for her money. She didn't get to negotiate for her dignity. You should refuse any thought of negotiating with Cal Brown.

Defense counsel objected to this statement. The trial court overruled the objection and reminded counsel the jury had been instructed that counsel's statements were argument and not testimony or evidence.

The defense moved for a mistrial at the conclusion of the State's closing argument, claiming the prosecutor's statements improperly appealed to the passion or prejudice of the jury. The defense in the alternative requested a curative instruction to the jury. The trial court denied the defense motion and noted, out of the presence of the jury, that "the argument of counsel [for the prosecution] was within

reasonable bounds. The jury has been instructed . . . . They have been told the arguments of counsel are not testimony, not evidence."

[19] The trial court did not abuse its discretion in denying the defense motion for a mistrial. The prosecuting attorneys' statements were not improper. "In closing argument a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence."[79] Both statements complained of were reasonably supported by evidence admitted in trial. Appellant admitted in his recorded statement to California police officers that he kidnapped Ms. Washa because he was out of money and wanted to rob her so he could go to California. He also admitted he forced her to write and cash checks for him. Under this evidence, it was reasonable for the prosecuting attorney to state in closing argument that Appellant had a financial motive for abducting Ms. Washa. Similarly, there was substantial evidence to support the prosecuting attorney's argument to the jury that the lesser included offense of second degree murder would not be appropriate in Appellant's case. Counsel's description of the lesser included offense as a "compromise," while overly simplistic, did not constitute misconduct. Both statements were fair comments on the evidence. Any prejudicial effect was minimized by the court's instruction to the jury.

Rebuttal Closing Argument (Guilt Phase)

Upon completion of the prosecuting attorney's rebuttal closing argument, the defense moved for a

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[79] *Gentry*, 125 Wn.2d at 641.

mistrial, claiming three instances of misconduct.

[20] The first instance was when the prosecuting attorney described as "ludicrous" the defense claim that Ms. Holly C. Washa had been asleep in Appellant's motel room while he made telephone calls to Ms. Susan J. Schnell and for airline reservations. Defense counsel's objection to this characterization was overruled. The defense made the claim in response to the State's theory that Appellant killed Ms. Washa to prevent her from informing the police of his future plans and whereabouts. The defense argued it was not necessary for Appellant to eliminate Ms. Washa as a witness because she was asleep during the telephone calls and was thus not aware of his plans. The remark by the prosecuting attorney was not improper. "It is not misconduct . . . for a prosecutor to argue that the evidence does not support the defense theory."[80] As an advocate, the prosecuting attorney is entitled to make a fair response to the arguments of defense counsel.[81] The prosecutor's characterization of the defense theory as "ludicrous" was reasonable in light of the evidence. Appellant admitted raping and torturing Ms. Washa over a prolonged period of time. It was the prosecution's contention that, under those circumstances, she was not likely asleep while Appellant was anywhere nearby. The use of the word "ludicrous" was simply editorial comment by the prosecuting attorney which was a strong, but fair, response to the argument made by the defense.

The second instance was the prosecuting

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[80] *Russell*, 125 Wn.2d at 87.

[81] *Id.*

attorney's characterization of Appellant as one who needs to "control." The evidence at trial supports that characterization. Appellant himself said in his recorded statement that he used torture to gain "control" over Ms. Washa. From this evidence alone the prosecuting attorney could reasonably draw and express the inference that Appellant used control to accomplish his purposes. Under these circumstances, use of the word "control" was not improper.

The third instance focuses on the prosecutor's use of transcripts of Appellant's recorded statements to the Palm Springs police officers. Appellant argues it was improper for the prosecuting attorney to read from the transcripts of the tapes during rebuttal because only the tapes, and not the transcripts, were admitted into evidence. This argument is without merit.

[21] The jury was informed the transcripts were not evidence of Appellant's statements. When the jurors listened to the tapes during trial, they were provided with transcripts to assist them in following the words. They were instructed at that time, however, that the words on the tapes, not the transcripts, were evidence of Appellant's statements, and that any inconsistency between the two should be resolved by reference to their collective memory of the contents of the tapes. They were reminded of this instruction again by the court after a side-bar conference requested by the defense immediately prior to reference to the transcripts by the prosecuting attorney. Under these circumstances, it was not improper for the prosecuting attorney to repeat portions of Appellant's statements by reading from the transcripts. Because the actual tapes were

admitted into evidence a trial, as State's Exhibit 89, Appellant was not prejudiced by any reference to portions of his statements during rebuttal since the jury had already heard the tapes. The trial court's denial of the motion did not constitute an abuse of discretion because none of the prosecuting attorney's statements or actions during rebuttal was improper.

Closing Argument (Penalty Phase)

Appellant claims the prosecuting attorney made two statements during closing argument in the penalty phase of the trial which constituted misconduct. The first was near the beginning of the state's closing argument when the prosecuting attorney stated:

> The legislature enacted the death penalty law so that it would be used in the most serious murder cases. So that in cases where the crime calls out for a death sentence, the jury, in its discretion and its common sense and its good judgment, would impose such a sentence. *I suggest to you that this crime screams out for the death sentence.*

(Emphasis added.)

Near the conclusion of the prosecutor's rebuttal closing argument, the prosecuting attorney stated:

> I talk about the reasons why the death penalty is appropriate. And one of the reasons it is appropriate, is just exactly the acts that he [Appellant] carried out, that is one of the reasons it's appropriate.
>
> *If the death penalty is not appropriate in this case, I'd ask you to try to think of a case*

that it would be appropriate in, considering his acts, considering his evil.

(Emphasis added.)

Because the defense did not object to either statement, this court will consider any error waived unless either remark was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.[82] Reversal is required only if there is a substantial likelihood either statement affected the jury's verdict.[83]

Both statements were supported by the evidence and thus were not improper. Appellant was convicted of committing a brutal murder with several aggravating factors. There was overwhelming evidence to support his conviction. Under these circumstances, the prosecuting attorney had wide latitude to make the argument that the evidence strongly supported imposition of the death penalty.[84] While the words used to make that argument (such as "screams out" and "evil") may be somewhat dramatic, they do not constitute misconduct warranting reversal in this case.

TESTIMONY OF SUSAN J. SCHNELL

(4) Whether the trial court erred in admitting the testimony of Ms. Susan J. Schnell, surviving victim in a criminal encounter with Appellant in California.

Evidence Rule 404(b)

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[82] *Id.* at 86.

[83] *Id.*

[84] *See Gentry*, 125 Wn.2d at 641.

Appellant claims the trial court erred in admitting the testimony of Ms. Susan J. Schnell under ER 404(b) in both the guilt and penalty phases of his trial. He argues that the reasons offered by the trial court for admitting the testimony were not adequate and that admission of the evidence violated his double jeopardy rights.

Prior to trial Appellant sought to exclude Ms. Schnell's testimony as inadmissible character evidence under ER 404(b). Acknowledging that the testimony was prejudicial to Appellant, the trial court concluded its probative value substantially outweighed any unfair prejudice. The court ruled the testimony was admissible because it placed in context the c rime for which Appellant was charged by describing the "fabric of events" or "res gestae" surrounding Ms. Holly C. Washa's murder. It also found the testimony was probative of intent, premeditation and the aggravating factors.

Appellant asked the trial court to reconsider its ruling admitting Ms. Schnell's testimony. The court adhered to its prior ruling and reemphasized the testimony was admissible as res gestae evidence and was probative of motive, intent and premeditation. It noted the testimony was also probative of the issue whether Appellant's acts constituted a common scheme or plan. The court again acknowledged the prejudicial nature of the testimony, but concluded its probative value far outweighed any unfair prejudice.

Just before Ms. Schnell testified during the guilt phase of the trial, the court did, however, instruct the jury concerning the limited basis for admitting her testimony. The court stated:

> Ladies and gentlemen, regarding the evidence you are about to hear, the Court advised you now that you may consider evidence of the defendant's conduct towards Ms. Susan J. Schnell only insofar as it bears on the issues of premeditation, intent and the four aggravating factors charged in the crime against Ms. Washa. You may not consider such evidence for any other purpose. In particular you must not use it to draw a conclusion about the defendant's *character or propensity to commit criminal acts.*

(Emphasis added.)[85]

Jury instruction 8, given by the court, was substantially similar to that oral instruction.[86]

ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[22] Under Evidence Rule 404(b) evidence of other misconduct is not admissible to show a defendant is a "criminal type."[87] However, crimes or misconduct other than the acts for which a defendant

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[85] Report of Proceedings at 104-05, Dec. 6, 1993.

[86] *See* Clerk's Papers at 1420.

[87] *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

is charged may be admitted for other reasons.[88] In addition to the non-exhaustive list of exceptions identified in Rule 404(b) itself, this court has recognized a res gestae or "same transaction" exception to the rule.[89] Under this exception, evidence of other crimes or misconduct is admissible to complete the story of the crime by establishing the immediate time and place of its occurance.[90] Where another offense constitutes a "link in the chain" of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible "in order that a complete picture be depicted for the jury."[91] Additionally, the rule itself allows evidence of other misconduct to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[92]

[23, 24] To admit evidence of other crimes or misconduct under ER 404(b), the trial court must identify on the record the purpose for which it is admitted.[93] Even if otherwise admissible for a valid purpose, Rule 404(b) evidence still must be relevant to a material issue and its probative value must

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[88] *Id.*

[89] *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995).

[90] *Id.*

[91] *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981).

[92] ER 404(b); *see also State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (citing exceptions).

[93] *Pirtle*, 127 Wn.2d at 649; *Powell*, 126 Wn.2d at 258; *Lane*, 125 Wn.2d at 832 (citing *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)).

outweigh its prejudicial effect.[94] Evidence is relevant if it makes the existence of a consequential fact more or less probably.[95] The trial court must also find by a preponderance of the evidence that the claimed misconduct occurred.[96] The decision to admit evidence of other crimes or misconduct lies within the sound discretion of the trial court[97] and will not be disturbed on appeal absent an abuse of discretion.[98] There is an abuse of discretion when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons.[99]

On December 6, 1993, Ms. Susan J. Schnell testified on direct examination concerning the circumstances leading to her encounter with Appellant. She related how she and Appellant first met and eventually made plans to spend Memorial Day weekend together in Palm Springs. She testified about Appellant's assault upon her in the hotel in Palm Springs:

Suddenly during the back rub he jerked

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[94] *Lane*, 125 Wn.2d at 831; *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); *Saltarelli*, 98 Wn.2d at 361-62; *see also Pirtle*, 127 Wn.2d at 649.

[95] *Saltarelli*, 125 Wn.2d at 361-62; *Powell*, 126 Wn.2d at 259.

[96] *Pirtle*, 127 Wn.2d at 649.

[97] *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 889 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988), *adhered to on rehearing*, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906, 80 A.L.R.4th 989 (1989).

[98] *Pirtle*, 127 Wn.2d at 648; *Lane*, 125 Wn.2d at 831; *Laureano*, 101 Wn.2d at 764.

[99] *Powell*, 126 Wn.2d at 258.

my arm behind my back very fast in a brutal way. My arms were jerked. As he was jerking my arms back, he said, "Don't scream." And at that point I did scream. And when I did scream, he slit my throat.[100]

Ms. Schnell also testified about Appellant's sexual assault upon her:

A. After the ba[n]dages, he had me sideways on the bed. And he was tying my legs with panty hose and turned different parts of the, would move the handcuffs from my hands to my feet and change the . . . place, change the restraints

Q. Did the defendant do anything more after that?

A. He did sexually assault me.

Q. Is this something that is difficult to talk about?

A. Yes. It is difficult to talk about.

Q. Would you tell the jury the nature of the sexual assault?

A. He shaved my hair off.

Q. He shaved the hair located, where?

A. My pubic hair. And had intercourse with me and asked me to perform oral sex on him.[101]

There was testimony from Ms. Schnell that,

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[100] Report of Proceedings at 135, Dec. 6, 1993.

[101] *Id. at 141.*

following the sexual assault, Appellant forced her to write several checks to him upon her account. She recalled that he rejected the first two checks because she had not matched to his satisfaction her signature on the checks with the signature on her driver's license.[102] On cross examination, Ms. Schnell testified that, prior to Appellant's initial assault upon her, they engaged in some consensual sex. She stated they kissed and fondled each other, and that Appellant performed oral sex on her.[103]

There was no abuse of discretion in admitting the testimony of Ms. Susan J. Schnell. The trial court identified on the record the reasons for its admission under ER 404(b). The testimony was relevant to material issues in the case relating to premeditation, intent, and the four aggravating factors. It also qualified as res gestae evidence because it provided the jury with a more complete picture of events surrounding the crimes committed against Ms. Holly C. Washa. The trial court properly weighed the probative value of the testimony against its prejudicial effect and concluded its probative value substantially outweighed its prejudicial effect.

Admission of the testimony of Ms. Schnell was proper under ER 404(b) because it was probative of Appellant's motive, intent, preparation and plan to kidnap, rob, and murder Ms. Holly C. Washa. It was the State's theory at trial that Appellant used Ms. Washa to finance his trip to join Ms. Susan J. Schnell in California. He was in contact with Ms. Schnell while he held Ms. Washa captive. Evidence of his encounter with Ms. Schnell supported the

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[102] *Id.* at 141-42.

[103] *Id.* at 154-55.

State's theory. That evidence also supported the State's argument that Appellant intended and premeditated Ms. Washa's killing to conceal his crimes so he could go to California to meet Ms. Schnell. Evidence that Appellant slit the throats of two captive women in two days tended to rebut his contention that his killing of Ms. Washa was merely an impulsive "spur of the moment" act.

The testimony of Ms. Schnell was similarly probative on the issue of Appellant's rape of Ms. Washa. Appellant contended at trial that the sexual contact between him and Ms. Washa was consensual. Ms. Washa was dead and not available to relate the true facts. Evidence of a sexual assault against Ms. Schnell would tend to rebut Appellant's contention. Just two days after his assault upon Ms. Washa, Appellant sexually assaulted Ms. Schnell in a markedly similar manner. Both women were bound with the same pair of handcuffs, gagged, and had their pubic hair shaved by Appellant before he raped them. Because of these similarities, evidence of the attack on Ms. Schnell made it more probable that the sexual contact between Appellant and Ms. Washa was by forcible compulsion, and less probable that it was consensual.

[25, 26] Although Appellant was not actually convicted of sexually assaulting Ms. Schnell in California, her testimony concerning the entire incident was supported by a preponderance of the evidence. Appellant pleaded "guilty" in California to the crimes of attempted murder in the first degree, aggravated mayhem, torture, robbery in the first degree, and false imprisonment with Ms. Schnell as

his victim.[104] This satisfies the preponderance of the evidence standard with respect to those crimes. Ms. Schnell's testimony concerning her sexual encounter with Appellant satisfies this standard as well. Her description of the assault upon her was consistent with the sexual assault upon Ms. Holly C. Washa. Although she testified she and Appellant earlier engaged in some consensual sexual activity, that activity occurred *prior* to Appellant's assault upon her. After having her throat cut, her pubic hair shaved, and being bound and gagged by Appellant, it is not reasonable to believe she consented to any further sexual activity with him. Under these circumstances, her testimony concerning the sexual assault was sufficient to satisfy the preponderance of the evidence standard.

The testimony of Ms. Schnell was also admissible as res gestae evidence because the crimes against Ms. Washa and against her were linked in significant ways. Appellant's kidnapping, assault and robbery of Ms. Schnell was similar to the crimes he committed against Ms. WAsha. Appellant sexually assaulted both women in a similar manner. He forced both women to write checks to him upon their respective bank accounts. He also used the same weapon to threaten both women into submission and to slit their throats. From this we can reasonably conclude that Appellant was engaged in an ongoing criminal enterprise of restraining, raping, robbing, and assaulting Ms. Washa and Ms. Schnell. Additionally, while Appellant was committing the crimes against Ms. Washa in Washington, he was also contacting Ms. Schnell to

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[104] Report of Proceedings at 45-46, Dec. 15, 1993.

finalize his plans to meet her in California. He admitted to Palm Springs police officers that he kidnapped, assaulted, robbed and abused Ms. Washa because he needed money to get back to California, where he ultimately met Ms. Schnell and embarked on a similar pattern of criminal behavior. The events in California culminated a sequence of events which began in Washington with the crimes involving Ms. Holly C. Washa as victim. Under these circumstances, the jury was entitled to know about the events in Palm Springs with Ms. Schnell as victim in order to have a more complete picture of the circumstances surrounding Ms. Washa's death.

[27, 28] Appellant argues that Ms. Schnell's testimony did not qualify as res gestae evidence because he committed the crimes against her more than two days after he committed the crimes against Ms. Washa and "hundreds of miles away in another state." This argument is without merit for two reasons. First, Rule 404(b) applies to evidence of other crimes or misconduct regardless whether they occurred *before or after* the conduct for which a defendant is currently charged.[105] Second, while res gestae evidence is, as Appellant argues, restricted to providing the *immediate* context within which a charged crime took place,[106] geographical distance

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[105] *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 889 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988), *adhered to on rehearing*, 113 Wn.2d 520, 782 P.2d 1013 (1989) (citing TEGLAND); 5 KARL B. TEGLAND, WASHINGTON PRACTICE EVIDENCE § 114, at 386 (3d ed. 1989).

[106] *See Lane*, 125 Wn.2d at 831; *see also* 1 MCCORMICK ON EVIDENCE § 190, at 799 (John W. Strong, ed., 4th ed. 1992) (res gestae evidence admissible "[t]o complete the story of

and the passage of two days between these two similar and connected crimes do not defeat immediacy of contact in this case.[107]

Appellant claims that even if the evidence of his crimes against Ms. Susan J. Schnell was admissible for a valid purpose, it was too prejudicial to be admitted. He concludes that because it was admitted, he is now entitled to a new trial. This claim, too, is without merit. The trial court considered the prejudicial nature of Ms. Schnell's testimony and determined its probative value outweighed that prejudice. As a cautionary measure, the court gave the jury limiting instructions which explained that the testimony was not to be considered as character or propensity evidence.

Double Jeopardy

Appellant maintains that permitting the jury to hear Ms. Schnell's testimony placed him twice in jeopardy for the same offense in violation of the state and federal constitutions.

[29] There is no violation of double jeopardy in this case. A defendant is subjected to multiple prosecutions for the same offense in violation of double jeopardy when (1) the charged offenses have identical statutory elements or one is a lesser included offense of the other, and (2) conduct constituting an offense for which the defendant has already been prosecuted will be used to establish an

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the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings." (footnote omitted)).

[107] *See Lane*, 125 Wn.2d at 833 (evidence of events occurring within a two- or three-day period of the charged crime admissible under res gestae exception to ER 404(b)).

essential element of an offense charged in a subsequent prosecution.[108]

[30] Appellant does not minimally satisfy this double jeopardy test because he was not prosecuted in Washington for the same conduct for which he was prosecuted in California. In California he was charged with and pleaded "guilty" to attempted murder in the first degree, aggravated mayhem, torture, robbery in the first degree and false imprisonment, with Ms. Susan J. Schnell as his victim. In this case, he was prosecuted for the crimes he committed in the state of Washington with Ms. Holly C. Washa as his victim.[109]

TESTIMONY OF JAN M. GRAY AND BRIEANNA C. WEST

(5) Whether the trial court erred in admitting the testimony of Ms. Jan M. Gray and Ms. Brieanna C. West, who had non-criminal encounters with Appellant in California and Washington.

Appellant argues that the trial court abused its discretion and committed reversible error by admitting the testimony of Ms. Jan M. Gray and Ms.

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[108] *State v. Brett*, 126 Wn.2d 136, 181, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996); *State v. Laviollette*, 118 Wn.2d 670, 676, 826 P.2d 684 (1992) (citing *Grady v. Corbin*, 495 U.S. 508, 521, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990)).

[109] Along with his double jeopardy claim, Appellant also argues his due process rights were violated when the trial court refused to "tell the jury [in the penalty phase] it could not consider the Susan Schnell facts as well as the uncharged sexual offense in deciding whether to impose death or life without parole." Br. of Appellant at 129.

Brieanna C. West during the guilt phase of his trial. He claims the court did not identify the relevance of this evidence and also did not balance its probative value against its prejudicial effect as required by ER 404(b).

During the trial the defense moved to exclude Ms. West's and Ms. Gray's testimony as irrelevant. It also argued their testimony was prejudicial because it might lead the jury to conclude Appellant was stalking Ms. West as another potential victim.[110] The court concluded the testimony of Ms. West and Ms. Gray did not constitute ER 404(b) character evidence because Appellant's contact with both women involved no crime or misconduct.[111] It also stated that:

> The State will not be allowed to argue that Ms. West or Ms. Gray were other potential victims that were simply waiting to happen . . . but I think that all of this information goes to setting the ground work, setting the scene . . . in front of the jury so that they can look at all the evidence before having to make the very difficult decisions in this case.[112]

Following the testimony of both Ms. West and Ms. Gray, the court orally instructed the jury there was no indication or allegations that Appellant intended to harm either of the two women. The court also instructed the jury that the testimony was presented "simply to place Mr. Brown's actions and

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[110] Clerk's Papers at 1089-90.

[111] Report of Proceedings at 10, Nov. 16, 1993.

[112] *Id.* at 10-11.

activities in some sort of logical context. You are not to consider the testimony for any other eason."[113] The jury was similarly instructed at the conclusion of the guilt phase of the trial.[114]

[13, 32] The admission of evidence lies within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion.[115] The trial court did not abuse its discretion in allowing the testimony of Ms. Gray and Ms. West. The testimony was relevant because it established background information on Appellant's trip to Seattle where he committed the crimes in this case. He was not prejudiced by the testimony of Ms. Gray and Ms. West because his contact with both women involved no crime or misconduct. Thus, it did not come within the purview of ER 404(b).[116] Any

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[113] Report of Proceedings at 77, Nov. 30, 1993.

[114] Clerk's Papers at 1419. See Jury Instruction Number 7.

[115] *Laureano*, 101 Wn.2d at 764.

[116] Appellant's reliance on *State v. Halstien*, 122 Wn.2d 109, 857 P.2d 270 (1993) for the proposition that Rule 404(b) applies to this testimony is misplaced. In *Halstien*, the defendant was convicted of burglary with a finding of sexual motivation, and the trial court had ruled that evidence of the defendant's prior contacts with the victim did not constitute prior bad acts under ER 404(b). *Halstien*, 122 Wn.2d at 125-26. This court held that prior bad acts included "acts that are merely unpopular or disgraceful" and concluded that defendant's prior contacts with the victim fell within the scope of Rule 404(b). *Id.* at 126. However, the defendant in that case had made the victim feel uncomfortable in their prior contacts by "watching her," asking unwelcome and inappropriate questions, and giving her "the creeps." *Id.* at 112-13. In this case, neither Ms. Gray nor Ms. West expressed any similar concerns regarding their prior contacts with Appellant.

possibility the jury might have speculated that Appellant was stalking Ms. West or Ms. Gray was obviated by the trial court's limiting instructions.[117]

MIRANDA RIGHTS

(6) Whether Appellant was adequately advised of his Miranda rights before making statements to Palm Springs, California police detectives.

[33] Appellant contends he was not adequately advised of his *Miranda* rights by the Palm Springs police before making his recorded statements and that those statements therefore should have been suppressed. He claims the warnings required under *Miranda v. Arizona* were inadequate because they did not explicitly inform him of his right to speak with an attorney *before* questioning.[118] Although Appellant's trial counsel did not move to suppress his statements to the Palm Springs police at trial on the grounds of inadequate advisement of *Miranda* rights, Appellant may nevertheless raise this issue for the first time on appeal.[119]

On May 27, 1991, Appellant was questioned

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[117] Appellant also argues that admission of the testimony of Ms. Gray and Ms. West "for eventual use in the penalty phase without the appropriate limiting instruction . . . permitted the jury to consider Mr. Brown's propensity to 'stalk' other victims besides Holly Washa." Br. of Appellant at 132. The testimony did not suggest Appellant was stalking either woman. And the court's limiting instruction on the matter, given twice to the jury, made that point sufficiently clear.

[118] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

[119] *See* RAP 2.5(a)(3).

for the first time by Palm Springs police detectives. One of the detectives informed Appellant of his rights before questioning began:

> **Detective:** Basically, you have the right to remain silent. Anything you say can and may be used against you in court. *You have the right to an attorney and have him present while you're being questioned*, and if you can't afford one, one will be appointed for you by the court.
>
> **Appellant:** All right.
>
> **Detective:** Okay, having those rights, all of those rights . . . .
>
> **Appellant:** Okay.
>
> **Detective:** Are you willing to talk?
>
> **Appellant:** I'm willing to talk.
>
> **Detective:** Are you willing to talk with us Cal?
>
> **Appellant:** Okay.

(Emphasis added.)[120]

Later that day, the Palm Springs detectives conducted another interview with Appellant, at the beginning of which he was again advised of his rights:

> **Detective:** I want to make sure that I've advised you of your rights on their case [King County's] too. You have the right to remain

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[120] Ex. 89, tape 1, side 1.

silent. Anything you say can and may be used against you in court.

. . . .

Detective: *You have the right to an attorney and to have him present when you're being questioned.* If you cannot afford one, one will be appointed for you.

. . . .

Detective: Do you understand those rights?

Appellant: I understand those rights?

(Emphasis added.)[121]

On May 28, 1991, the detectives spoke with Appellant at his request and he was again advised of his rights:

Detective: Okay. Cal, we're here because you asked us to come in and before we talk to you, I go over your rights every time.

Appellant: Okay.

. . . .

Detective: You have the right to remain silent. Anything you say can and may be used against you in court. *You have the right to an attorney and to have him present when you're being questioned.* If you cannot afford an attorney, one will be appointed for you if you

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[121] Ex. 89, tape 2, side 1.

desire.

Appellant: Right.

Detective: Do you understand those rights?

Appellant: Right.

(Emphasis added.)[122]

Under *Miranda*, a suspect in custody "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."[123] The right to the presence of an attorney includes the right to consultation with counsel both *before and during* questioning.[124] Violation of any of the *Miranda* requirements results in exclusion of any statement given by the suspect.[125]

[34] However, there is no requirement that the warnings be given in the precise language stated in *Miranda*. No "talismanic incantation" is required.[126] "Reviewing courts . . . need not examine *Miranda* warnings as if construing a will or defining

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[122] Ex. 89, tape 3, side 1.

[123] *Miranda*, 86 S. Ct. at 1630.

[124] *See Duckworth v. Eagan*, 492 U.S. 195, 109 S. Ct. 2875, 2879, 106 L. Ed. 2d 166 (1989); *Cooper v. Dupnik*, 963 F.2d 1220, 1239-40 (9th Cir.), *cert. denied*, 506 U.S. 953 (1992); *State v. Creach*, 77 Wn.2d 194, 461 P.2d 329 (1969).

[125] *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 1292, 84 L. Ed. 2d 222 (1985).

[126] *Duckworth*, 109 S. Ct. at 2880.

the terms of an easement."[127] The question is whether the warnings reasonably and effectively conveyed to a suspect his rights as required by *Miranda*.[128]

The case of *People of the Territory of Guam v. Snaer* is on point. There, the United States Court of Appeals for the Ninth Circuit held this warning was adequate under *Miranda*: "You have a right to consult with a lawyer and to have a lawyer present with you while you are being questioned."[129] The defendant in that case argued, as Appellant does here, that his *Miranda* warnings were inadequate because he had not been specifically advised he had a right to consult with an attorney *before* being questioned.[130] The court rejected that claim and concluded the first part of the warning, when read with the latter part, adequately conveyed notice of the right to consult with counsel *before* questioning.[131] In reaching that conclusion, the court noted that "[i]f a defendant has been told the substance of his constitutional rights, it is not fatal if irrelevant words or words with no independent substance are omitted."[132]

[35] As with the warnings at issue in *Snaer*,

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[127] *Id.*

[128] *Id.* at 2880.

[129] *People of the Territory of Guam v. Snaer*, 758 F.2d 1341, 1342-43 (9th Cir.), *cert. denied*, 474 U.S. 828, 106 S. Ct. 90, 88 L. Ed. 2d 74 (1985).

[130] *Id.* at 1342.

[131] *Id.* at 1343.

[132] *Id.* at 1343 (quoting *United States v. Noti*, 731 F.2d 610, 614-15 (9th Cir. 1984)).

the *Miranda* warnings given Appellant by Palm Springs detectives adequately advised him of his constitutional rights. Prior to each of his three interviews with the detectives, Appellant was warned (1) that he had the right to an attorney *and* (2) that he had the right to have that attorney present during questioning. When read with the latter portion of that statement, the first part adequately advised Appellant he had the right to consult with counsel before questioning. Although the actual words "before questioning" were not included in the first part of the statement, the second part which read "and to have him present when you're being questioned" made that point sufficiently clear.[133]

RECORDING OF APPELLANT'S CUSTODIAL STATEMENT AND RCW 9.73.090

(7) Whether Appellant's statements to Palm Springs, California police, which were recorded without his knowledge as permitted by California law, violated Washington's Privacy Act, RCW 9.73, and thus were inadmissible in Washington courts.

Appellant claims his recorded statements should have been suppressed because they violated either or both RCW 9.73.030 and .090(1)(b)(i) and because the Palm Springs, California police officers were agents of the King County Police Department.

[36] Washington's Privacy Act, RCW 9.73, is

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[133] *See State v. Koopman*, 68 Wn. App. 514, 520, 844 P.2d 1024 (1992) (rejecting appellant's claim that her *Miranda* warnings were defective because she had not been explicitly told she had the right to have counsel present *before* and during questioning), *review denied*, 121 Wn.2d 1012 (1993).

designed primarily to protect private persons from public dissemination of illegally obtained information.[134] This Court has concluded that "RCW 9.73.090 is specifically aimed at the specialized activity of police taking recorded statements from arrested persons, as distinguished from the general public."[135] In *State v. Rupe*, this Court again confirmed that "RCW 9.73.090, unlike RCW 9.73.030, applies specifically to individuals who have been arrested."[136] Appellant made his statements to Palm Springs police officers after his arrest. Thus RCW 9.73.090, and not RCW 9.73.030, initially would be applicable in this case.[137] RCW 9.73.090(1) provides in pertinent part:

> (1) The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police, fire, emergency medical service, emergency communication center, and poison center

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[134] *State v. Fjermestad*, 114 W.2d 828, 834, 791 P.2d 897 (1990); *State v. Wanrow*, 88 Wn.2d 221, 233, 559 P.2d 548 (1977).

[135] *State v. Cunningham*, 93 Wn.2d 823, 829, 613 P.2d 1139 (1980).

[136] *State v. Rupe*, 101 Wn.2d 664, 683, 683 P.2d 571 (1984).

[137] RCW 9.73.030(1)(b) provides:

"91) Except as otherwise provided in this chapter, it shall be unlawful for . . . the state of Washington, its agencies, and political subdivisions to intercept, or record any:

". . . .

"(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation . . . without first obtaining the consent of all the persons engaged in the conversation."

personnel in the following instances:

. . . .

(b) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:

(i) The arrested person shall be informed that such recording is being made and the statements so informing him shall be included in the recording;

(ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;

(iii) At the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording;

(iv) The recordings shall only be used for valid police or court activities.

[37] The Palm Springs police officers recorded Appellant's statements. This is standard practice for Palm Springs police in serious felony cases.[138] But they did not inform Appellant of the recording. It is not disputed that they could record Appellant's statements without his consent under California

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[138] Supplementation of Report of Proceeding, at 2, July 10, 1992.

Law.[139] But if this were done in Washington, it most probably would be in violation of RCW 9.73.090(1)(b). Our concern then becomes whether evidence lawfully obtained by police authorities in California should be suppressed in a criminal case in Washington State if similar action by Washington authorities would be in violation of Washington law.

Appellant claims *State v. Gwinner*,[140] *State v. Mollica*[141] and *State v. Johnson*[142] support the argument that his recorded statements to California police should have been suppressed. Those cases addressed a question similar to this one, that is, whether evidence lawfully obtained by federal agents under federal law is admissible in Washington criminal proceedings when similar action by state authorities would violate the Washington Constitution. Those cases are at least pertinent to the issue in this case.

In *Gwinner*, the Court of Appeals, Division One, adopted the principle that evidence independently obtained by federal officers in compliance with federal law, but in violation of state constitutional guaranties, is admissible in Washington state criminal proceedings.[143] In that case a Washington detective telephoned a federal

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[139] *See* CAL. PENAL CODE §§ 632, 633 and 633.5 (West Supp. 1992).

[140] *State v. Gwinner*, 59 Wn. App. 119, 796 P.2d 728 (1990), *review denied*, 117 Wn.2d 1004 (1991).

[141] *State v. Mollica*, 114 N.J. 329, 554 A.2d 1315 (1989).

[142] *State v. Johnson*, 75 Wn. App. 692, 879 P.2d 984 (1994), *review denied*, 126 Wn.2d 1004 (1995).

[143] *Gwinner*, 59 Wn. App. at 120.

officer with information on the defendant, who was suspected of carrying drugs. Federal officers arrested the defendant as he was walking to his automobile. They also conducted a warrantless search of his vehicle, permissible under federal law but impermissible under Washington Constitution article I, § 7. The search yielded cocaine, the evidence defendant sought to suppress. In determining the evidence was admissible, the court in *Gwinner* looked to *State v. Mollica*,[144] a New Jersey case which addressed the same question.

The court in *Mollica* traced the history of the "silver platter" doctrine, which developed when federal standards for searches and seizures were more protective than many state standards.[145] Because of the different standards, federal courts adopted the principle that any evidence independently obtained by state officials could be given to federal officials on a "silver platter."[146] The court concluded that under federalism principles, state constitutions do not dictate federal action,[147] and no legitimate state interests would be furthered by forbidding transfer of criminal evidence from federal to state authorities when the evidence was

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[144] *State v. Mollica*, 114 N.J. 329, 554 A.2d 1315 (1989).

[145] *Gwinner*, 59 Wn. App. at 124 (citing *Mollica*, 554 A.2d at 1324-26).

[146] *Id.* (citing *Mollica*, 554 A.2d at 1324). However, the Supreme Court rejected the silver platter doctrine in 1960. *Elkins v. United States*, 364 U.S. 206, 223, 80 S. Ct. 1437, 1447, 4 L. Ed. 2d 1669 (1960).

[147] *Gwinner*, 59 Wn. App. at 125 (citing *Mollica*, 554 A.2d at 1327).

lawfully obtained by the former.[148] Employing the "silver platter" doctrine, the court thus determined such evidence need not be suppressed if the federal officers acted without the assistance or cooperation of the state officers.[149]

The "key element of the silver platter doctrine requires that the officers of the federal jurisdiction not act as agents of the forum state jurisdiction nor under color of state law."[150] To determine whether the federal authorities are acting in such a manner, the courts consider, among other things:

> [A]ntecedent mutual planning, joint operations, cooperative investigations, or mutual assistance between federal and state officers may sufficiently establish agency and serve to bring the conduct of the federal agents under the color of state law. On the other hand, mere contact, awareness of ongoing investigations, or the exchange of information may not transmute the relationship into one of agency.[151]

The court in *Gwinner* found the contact between the Washington detective and the federal agents to be a mere "transfer of information by telephone."[152] There was no evidence that the detective requested the federal officers to search the defendant's car or that the detective knew

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[148] *Id.* (citing *Mollica*, 554 A.2d at 1327-29).

[149] *Id.* (citing *Mollica*, 554 A.2d at 1329-30).

[150] *Id.* at 125.

[151] *Id.* (quoting *Mollica*, 554 A.2d at 1329) (alteration in original).

[152] *Id.*

beforehand they would do it. The court held no agency relationship existed between the federal officers and the state. Thus the conduct of the federal officers was not under color of state law and the evidence was not suppressed.

In *Johnson*, the Court of Appeals, Division Two, reached a different conclusion than *Gwinner* on the same question because the federal authorities did not independently obtain the evidence at issue. In *Johnson*, state and federal officers worked together in investigating and arresting the defendants, a Washington couple. The court found numerous contacts between the state and federal authorities: (1) a Washington detective went with federal officers to investigate the defendants' property; (2) the detective helped federal officers very information; (3) state authorities took pictures of the defendants' property at the request of federal authorities and gave the photographs to them; (4) both state and federal authorities executed the warrant to search defendants' property; (5) evidence seized from the defendants' property was turned over to the state; and (6) the husband was turned over to the state of Washington after his arrest. The court concluded the federal authorities acted with the "cooperation and assistance" of state authorities and this conduct triggered state constitutional protection.[153]

The reasoning of *Gwinner*, *Mollica* and *Johnson* leads to the preliminary conclusion that whether Appellant's recorded confessions should be suppressed depends upon the answer to the question whether the Palm Springs police were "agents" of

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[153] *Johnson*, 75 Wn. App. at 700 (quoting *Gwinner*, 59 Wn. App. at 125).

this state, as defined under those cases, or whether the Palm Springs police merely acted with the "cooperation and assistance" of King County police, as interpreted in *Johnson*.

The Palm Springs police arrested Appellant and questioned him concerning events surrounding the injuries to Ms. Susan J. Schnell in California. During the initial interview, Appellant asked the officers to tell the King County police to come and talk with him. He articulately and unhesitatingly described in great detail the events surrounding Ms. Holly C. Washa's death and told them her body would be found in the trunk of a 1985 Oldsmobile parked in space 266 at the Budget Parking lot next to Shumsky's Restaurant near the Seattle-Tacoma Airport. After the interview, the officers contacted the King County Police and told them about the information Appellant had given. After locating the 1985 Oldsmobile as Appellant directed and finding Ms. Washa's body in the trunk, the King County police contacted the Palm Springs Police Department and asked them to get a statement from Appellant. The Palm Springs police told Appellant about the King County police request and asked if he was willing to give a statement. Appellant explained what he would say and then told them "Okay, you can let them know that I'm willing to cooperate up there . . . ."[154]

The State correctly points out that the facts here are more similar to *Gwinner* than to *Johnson*. In *Gwinner*, the Washington state detective merely contact the federal officers with information about the defendant. The detective did not ask them to

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[154] Ex. 89, tape 2, side 1.

search the defendant's automobile and did not know beforehand they would conduct the search. In this case, the State simply telephoned Palms Springs police and asked them to get a statement from Appellant. The King County police did not tell the Palm Springs police what to ask or how to conduct the interview. Nor did they know the Palm Springs police would record Appellant's statements.

Appellant contends the Palm Springs police were "cooperating and assisting" King County police by questioning him about the Washington incidents. But the pertinent question is whether King County police cooperated with and helped Palm Springs police so extensively that the latter did not "independently" obtain Appellant's statements. When compared to *Johnson*, the facts here do not support a conclusion that King County police were "cooperating [with] and assisting" the Palm Springs police. The King county police merely telephoned Palm Springs police and asked them to question Appellant. Unlike in *Johnson*, in this case there was no collaborative effort between the two police departments in obtaining statements from Appellant.

Appellant's argument that his recorded statements should have been suppressed under *Gwinner*, *Johnson* and *Mollica* is thus not convincing.[155] The Palm Springs police lawfully and

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[155] The trial court found an agency relationship was created when the State asked the Palm Springs police to question Appellant further. However, the court concluded that the King County police did not know the statements would be recorded; no evidence suggested King County police were trying to violate Washington law; and the Palm Springs police were following California law. Thus, suppressing the tapes would

independently recorded the statements under California law. Those statements were therefore admissible at trial, even though similar action in Washington might have been in violation of RCW 9.73.090(1)(b).

Appellant does not identify any state interest to be advanced by suppressing the recorded statements. No Washington state officer violated RCW 9.73 and no one's privacy interests protected by the statute were infringed. As suggested by the State, suppression of the statements would serve only to keep highly probative and lawfully obtained evidence from the jury.

The State asks this court to adopt and affirm the reasoning of *State v. Mayes*[156] in resolving the question whether evidence lawfully obtained in another state should be admissible in Washington state, even if similar action by officers in this state would violate Washington law. In *Mayes* the Court of Appeals, Division Two, concluded the Privacy Act, RCW 9.73, did not apply to evidence obtained by police officers of another state within that state and according to its laws. *Mayes* acknowledged that "Washington has no criminal jurisdiction over actions having no effect in this state."[157] In *State v. Williams* this court noted the *Mayes* decision was based upon the doctrine that "a state legislature's enactment of a privacy statute creates a privacy expectation only for individuals who are within the b

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not further Washington's interest. Report of Proceedings, vol. 4-B, at 53-55 (Sept. 15, 1992).

[156] *State v. Mayes*, 20 Wn. App. 184, 579 P.2d 999, *review denied*, 91 Wn.2d 1001 (1978).

[157] *Id.* at 193.

orders of that state."[158] Other jurisdictions have reached the same conclusion.[159] However, the court noted in *Williams* it had not yet addressed the validity of that doctrine.[160]

This Court in *In re Teddington* declared the *Gwinner* decision "correctly" held that evidence "independently and lawfully obtained by federal officers acting pursuant to federal law may be transferred to state authorities for use in a Washington State criminal proceeding."[161] We agree with the conclusion reached in *Mayes* and rule that RCW 9.73 does not apply to Appellant's statements taken by Palm Springs police and lawfully recorded without his knowledge or consent.

SUFFICIENCY OF THE RECORD FOR APPELLATE REVIEW

(8) Whether there is before this court a record of "sufficient completeness" for adequate appellate review of the issues presented in Appellant's appeal.

Appellant argues there is not a record of sufficient completeness for adequate review of his

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[158] *State v. Williams*, 94 Wn.2d 531, 540 N.1, 617 P.2d 1012, 24 A.L.R.4th 1191 (1980) (citing *Mayes*, 20 Wn. App. at 193).

[159] *Williams*, 94 Wn.2d at 540, n.1 (citing *Commonwealth v. Bennett*, 245 Pa. Super. 457, 369 A.2d 493 (1976)).

[160] *In re Personal Restraint of Teddington*, 116 Wn.2d 761, 772-73, 808 P.2d 156 (1991). *See also State v. Bradley*, 105 Wn.2d 898, 902-03, 719 P.2d 546 (1986) ("Neither state law nor the state constitution can control federal officers' conduct.").

[161] *Id.*

conviction and sentence of death and that therefore he is entitled to a new trial. He takes issue with the absence of a portion of the CrR 3.5 pretrial hearing verbatim report of proceedings involving the July 10, 1992 testimony of one of the Palm Springs detectives who interrogated him. He concludes that because this portion of the record (which addresses his *Miranda* warnings) is missing, appellate counsel is unable to effectively assign and argue error on appeal, denying him the right to effective assistance of counsel and due process. He also concludes that the missing transcript prevents this court from properly considering his arguments on appeal relating to his *Miranda* warnings, ER 404(b) evidence, and RCW 9.73. This claim is without merit.

Due Process requires that a record of "sufficient completeness" be provided for appellate review of the errors raised by a criminal defendant.[162] RCW 10.95.100 provides that a death sentence must be reviewed by this court "on the record." RAP 9.1(a) provides that the "record on review" may consist of (1) a report of proceedings, (2) clerks papers, (3) exhibits, and (4) a certified record of administrative adjudicative proceedings. RAP 9.1(b) provides that "the report of proceedings may take the form of a 'verbatim report of proceedings' . . ., a 'narrative report of proceedings' . . ., or an 'agreed report of proceedings'. . . ." And RAP 9.3 authorizes

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[162] *See Draper v. Washington*, 372 U.S. 487, 496-98, 9 L. Ed. 2d 899, 83 S. Ct. 774, 779-80, *cert. denied*, 374 U.S. 850 *and* 374 U.S. 852 (1963). *See also State v. Larson*, 62 Wn.2d 64, 66-67, 381 P.2d 120 (1963). ("Under the rule of the *Draper* case, we must have a '*record of sufficient completeness*' for a review of the errors raised by the defendant in a criminal case.")

use of a narrative report of proceedings if the court reporter's notes are lost.

[38] There is no verbatim report of proceedings for the portion of the CrR 3.5 pretrial hearing held on July 10, 1992 because the court reporter was unable to find the notes for that day. As a result, this court directed the trial court to "settle all issues regarding the completion of the record for review" in this case. The trial court accordingly prepared from its notes taken at the July 10, 1992 hearing a Supplementation of Report of Proceeding. This provided a record of sufficient completeness for adequate review of the issues raised by Appellant.

The trial court's Supplementation of Report of Proceedings, based upon contemporaneous notes taken by the court on July 10, 1992, constitutes a narrative report of proceedings for that portion of the hearing sufficient to make the record complete. Appellant's assertion that the trial court's narrative report is "conclusory at best" on the issue of *Miranda* warnings is rebutted by the fact that, along with the trial court's narrative report, the record on review also contains the tape recordings of Appellant's statements to the Palm Springs Police which included *Miranda* warnings,[163] as well as the trial court's oral ruling on the issues of *Miranda* warnings and RCW 9.73.[164] Additionally, there are verbatim reports of all other proceedings, including the

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[163] See Ex. 89 The extensive verbatim record of proceedings consists of more than 50 volumes. The Clerk's Papers number more than 1700. The trial court admitted 93 exhibits.

[164] Report of Proceedings at 2-12, Sept. 15, 1993.

testimony of Ms. Schnell, Ms. West and Ms. Gray. We reject Appellant's claim that the record is not sufficiently complete for review of the issues in this case.

DEATH QUALIFICATION OF JURORS

(9) Whether the trial court erred in allowing prospective jurors to be "death qualified" during voir dire examination.

The Sixth Amendment to the United States Constitution and WASH. CONST. art. I, § 22 both warrant a defendant "the right to . . . an impartial jury." To ensure an impartial jury in capital cases, prospective jurors opposing the death penalty can be challenged for cause and excluded if their "views would 'prevent or substantially impair the performance of [their] duties as . . . juror[s],'" according to their instructions and their oath.[165] This process is termed "death qualification."[166] In this case, the State "death qualified" the jury during voir dire. The Supreme Court has consistently held that the United States Constitution does not prohibit the states from death qualifying juries in capital cases.[167] However, Appellant claims death qualifying

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[165] *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980)); *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d 29 (1995) (quoting *State v. Hughes*, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting *Wainwright v. Witt*, 469 U.S. at 424)), *cert. denied*, 516 U.S. 1121 (1996).

[166] *See Hughes*, 106 Wn.2d at 180.

[167] *Lockhart v. McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986); *Wainwright v. Witt*, 469 U.S. 412; *Adams v. Texas*, 448 U.S. 38; *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).

a jury violates the Washington Constitution, article I, §§ 21 and 22 because it produces a jury more prone to convict.[168]

[39, 40] Whether the Washington Constitution should be independently analyzed as granting more protection than the federal constitution is determined by examining six nonexclusive factors set forth in *State v. Gunwall.*[169] Those factors are: (1) the textual language of the state constitutional provision at issue; (2) differences in the parallel texts of the federal and state constitutions; (3) state constitutional and common-

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[168] Br. of Appellant at 94-101, 105-12. Although Appellant also contends death qualification disproportionately excludes minorities and women from the jury panel, he does so in general terms and does not claim the jury in this case was disproportionately exclusive of women or minorities. The record does not support that claim. And Appellant presents no evidence showing that death qualification in Washington results in the systematic exclusion of minorities and women from the jury panel.

[169] *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517, (1986). In *State v. Hughes,* 106 Wn.2d 176 this Court concluded that death qualifying a jury was permissible not only under the federal constitution, but under the state constitution as well. Some cases have relied upon *Hughes* to reach the same conclusion. *See State v. Gentry,* 125 Wn.2d 570, 634, 888 P.2d 1105, *cert. denied,* 516 U.S. 843 (1995); *State v. Kron,* 63 Wn. .App. 688, 695, 821 P.2d 1248, *review denied,* 119 Wn.2d 1004 (1992); *State v. Peerson,* 62 Wn. App. 755, 779, 816 P.2d 43 (1991), *review denied,* 118 Wn.2d 1012 (1992). But *Hughes* did not analyze the six factors in *State v. Gunwall* to conclude that death qualification is allowed under the Washington Constitution. Thus, in determining whether death qualification violates the Washington Constitution, *Hughes* and the cases following do not control at this point. *See State v. Irizarry,* 111 Wn.2d 591, 595-97, 763 P.2d 432 (1988) (Utter, J., concurring).

law history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state or local concern.[170] This Court will address a state constitutional claim only if the claimant sufficiently briefs the *Gunwall* factors.[171] Appellant has satisfied that requirement.

Gunwall Analysis

The first *Gunwall* factor requires this Court to examine the text of the state constitutional provisions at issue. provides that "[t]he right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record. . . . " Const. art. I, § 22 (amend. 10) provides that "[i]n criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury. . . ." CONST. art. I, § 21 emphasizes the importance of the right to trial by jury, by declaring the right "shall remain inviolate." Nothing in the state constitutional provisions suggests that death qualifying a jury is prohibited.

The second *Gunwall* factor requires this Court to consider significant differences between the texts of parallel provisions of the federal and state constitutions. The Sixth Amendment and CONST. art. I, § 21, are similar in that both grant the "right

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[170] *Gunwall*, 106 Wn.2d at 61-62.

[171] *State v. Wethered*, 110 Wn.2d 466, 472-73, 755 P.2d 797 (1988); *State v. Olivas*, 122 Wn.2d 73, 82, 856 P.2d 1076 (1993). *See also State v. Brett*, 126 Wn.2d 136, 159, 892 P.2d 29 (1995) (declining to discuss the defendant's right to an impartial jury under CONST. art. I, § 22 because the *Gunwall* factors were not analyzed), *cert. denied*, 516 U.S. 1121 (1996).

to . . . an impartial jury." But CONST. art. I, § 21, which declares "[t]he right of trial by jury shall remain inviolate. . . ." has no federal counterpart. This Court in *Pasco v. Mace*[172] found that difference between the state and federal constitutions significant enough to hold that the right to a jury trial under the state constitution, unlike the federal constitution, extended to the case of any adult criminal offense, including petty offenses. But *Pasco* did not address death qualification and is of little relevance to this case.[173]

Under the third *Gunwall* factor this Court must look to common law and constitutional history. Appellant relies on *Pasco v. Mace*,[174] *State v. Lane*[175] and *State v. Stegall*[176] to argue that case law supports the proposition that the right to a jury trial under the state constitution is broader than under the federal constitution. Appellant's reliance on those cases in this context is misplaced. The Court in *Pasco* held the state constitutional right to a jury trial extended to all cases of adult criminal offenses, including petty offenses. In *Lane* the Court

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[172] *State v. Wethered*, 110 Wn.2d 466, 472-73, 755 P.2d 797 (1988); *State v. Olivas*, 122 Wn.2d 73, 82, 856 P.2d 1076 (1993). *See also State v. Brett*, 126 Wn.2d 136, 159, 892 P.2d 29 (1995) (declining to discuss the defendant's right to an impartial jury under CONST. rat. I, § 22 because the *Gunwall* factors were not analyzed), *cert. denied*, 516 U.S. 1121 (1996).

[173] *City of Pasco v. Mace*, 98 Wn.2d 87, 653 P.2d 618 (1982).

[174] *City of Pasco v. Mace*, 98 Wn.2d 87.

[175] *State v. Lane*, 40 Wn.2d 734, 246 P.2d 474 (1952).

[176] *State v. Stegall*, 124 Wn.2d 719, 723, 881 P.2d 979 (1994).

determined an accused can waive his right to trial by a jury of twelve "and submit his cause to eleven jurors," as the defendants did in that case.[177] *Stegall* recognizes the right to a 12-person jury and sets forth requirements for a valid waiver of that right.[178] Neither of these cases addresses the constitutionality of death qualification under the state constitution.

Appellant further asserts that *Pasco, Lane* and *Stegall* evidence this state's intent to expand federal constitutional protections relating to jury questions. Appellant's assertion has little merit. In *State v. Schaaf*[179] this Court applied the *Gunwall* analysis and held that the state constitution gives no greater right to a jury trial for juveniles than does the federal constitution. Additionally, the constitutional history shows there is no indication the framers intended the state constitutional right to a jury to be broader than the federal right and particularly in the context of death qualification.[180]

Under the fourth *Gunwall* factor we look for guidance to preexisting law, or law existing prior to adoption of the Washington Constitution.[181] At the time CONST. art. I, §§ 21 and 22 were adopted, CODE OF 1881 § 1083, at 202, provided:

> No person whose opinions are such as to preclude him from finding any defendant

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[177] *Lane*, 40 Wn.2d at 737.

[178] *Stegall*, 124 Wn.2d at 729.

[179] *State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987).

[180] *See* THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 510-11 (Beverly Paulik Rosenow ed., 1962).

[181] *Gunwall*, 106 Wn.2d at 61-62.

> guilty of an offense punishable with death, shall be compelled or allowed to serve as a juror on the trial of any indictment for such an offense.

As that passage indicates, preexisting law supports the process of death qualification. And, as the State points out, no preexisting body of state law supports a broader interpretation of CONST. art. I, §§ 21 and 22 in this context.

The fifth *Gunwall* factor requires this Court to examine the structural differences between the federal constitution and the state constitution. That factor always favors independent state constitutional analysis "because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power."[182]

Under the sixth *Gunwall* factor this Court examines whether the matter at issue is of particular state interest or local concern. In *Taylor v. Louisiana,* the United States Supreme Court stated:

> The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community.[183]

The Supreme Court has also emphasized there is not "any one right way for a State to set up its capital

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[182] *Gunwall*, 106 Wn.2d at 61-62.

[183] *State v. Gocken*, 127 Wn.2d 95, 105, 896 P.2d 1267 (1995) (citing *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994)).

sentencing scheme."[184] Those statements suggest the death qualification process is a matter of purely local state concern. Even though that may be true, this court has shown no inclination to provide broader protection of defendants' constitutional rights in the context of death qualification.[185]

[41, 42] Applying the *Gunwall* factors leads us to conclude there is no basis for Appellant's argument that Const. art. I, §§ 21 and 22 should be independently analyzed as affording broader protection in the context of death qualification than the Sixth Amendment. Washington's common law, statutory history and constitutional history do not support Appellant's claim that death qualifying a jury violates the Washington Constitution article I, §§ 21 and 22.[186] Previous capital cases, including *State v. Hughes*[187] and *State v.* Mak,[188] in which a

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[184] *Morgan v. Illinois*, 504 U.S. 719, 725-26, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992) (quoting *Spaziano v. Florida*, 468 U.S. 447, 464, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984)).

[185] *E.g.*, *Hughes*, 106 Wn.2d 176; 181; *Gentry*, 125 Wn.2d 570, 634.

[186] Appellant urges this Court to adopt several dissenting opinions of cases from New Jersey and Utah, including *State v. Ramseur*, 106 N.J. 123, 524 A.2d 188, 250-57 (1987), *cert. denied*, 508 U.S. 947 (1993); *State v. Bey*, 112 N.J. 123, 548 A.2d 887, 900 (1988); *State v. Marshall*, 123 N.J. 1, 586 A.2d 85, 129-34 (1991) and *State v. Young*, 853 P.2d 327, 342-43 (Utah 1993), from which Appellant cites extensively to support his claim that death qualification violates the Washington Constitution. The *Gunwall* analysis contradicts his claim. Although informative, those dissenting opinions do not affect our independent state constitutional analysis.

[187] *State v. Hughes*, 106 Wn.2d 176.

Gunwall analysis was not conducted, properly upheld death qualification as valid under the Washington Constitution.

[43, 44] Appellant argues death qualification produces a conviction-prone jury in violation of his right to an impartial jury. But that argument overlooks the fact that the State also has a right to an impartial jury.[189] This Court acknowledged in *Hughes* that the voir dire process is aimed at excluding persons who cannot be fair to both sides of the case:

> The guarantee of impartiality cannot mean that the state has a right to present its case to the jury *most* likely to return a verdict of guilt, nor can it mean that the accused has a right to present his case to the jury *most* likely to acquit. But the converse is also true. The guarantee cannot mean that the state must present its case to the jury *least* likely to convict or impose the death penalty, nor that the defense must present its case to the jury *least* likely to find him innocent or vote for life imprisonment.
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> . . . .
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> The logical converse of the proposition that death-qualified jurors are conviction prone is that non-death-qualified jurors are

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[188] *State v. Mak*, 105 Wn.2d 692, 707, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986), *sentence vacated on writ of habeas corpus sub nom. Mak v. Blodgett*, 754 F. Supp. 1490 (W.D. Wash. 1991), *aff'd*, 970 F.2d 614 (9th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993).

[189] *Hughes*, 106 Wn.2d at 185 (citing *Hayes v. Missouri*, 120 U.S. 68, 70-71, 7 S. Ct. 350, 30 L. Ed. 578 (1887)).

acquittal prone, not that they are neutral.[190]

In *Hughes* this Court declined "to define 'impartial' as 'a middle ground that involves a jury with persons who are in effect defendant prone.'"[191] Impartiality of jury members is presumed when they are selected from a fair cross-section of the community and they can properly follow their oath to apply the law to the facts of the case "regardless of the mix of individual view points actually represented" by the jurors.[192]

Appellant also refers to studies reviewed in the United States Court of Appeals for the Eighth Circuit in *Grigsby v. Mabry*[193] to support his claim that death qualified juries are more prone to convict. But in *Hughes* this Court considered and rejected a similar claim by defendant which relied on the studies in *Grigsby*.[194]

Statutory Basis

Appellant asserts death qualification is unconstitutional because it has no statutory basis after former RCW 10.49.050[195] was repealed in 1981.

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[190] *Id.* at 185-86 (quoting *Smith v. Balkcom*, 660 F.2d 573, 579 (5th Cir. 1981), *modified on other grounds*, 671 F.2d 858 (5th Cir.), *cert. denied*, 459 U.S. 882 (1982)) (first alteration and emphasis in original).

[191] *Id.* at 186 (quoting *Smith*, 660 F.2d at 579).

[192] *Id.* at 186 (quoting *Lockhart v. McCree*, 476 U.S. at 184).

[193] *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985), *rev'd sub nom. Lockhart v. McCree*, 476 U.S. 162 (1986).

[194] *Hughes*, 106 Wn.2d at 182-84. *Hughes* also rejects Appellant's suggestion that separate juries should be required for the guilt and penalty phase. *Id.* at 186-88.

[195] Former RCW 1049.050 provided:

He relies chiefly upon *Witherspoon v. Illinois*[196] to support his assertion. He also contends no court rules authorize the death qualification process.

[45] The State argues RCW 4.44.170(2) and CrR 6.4(c) provide sufficient basis for death qualification. RCW 4.44.170(2) provides for challenging a juror for cause for actual bias:

> For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias.

Although the statute does not specifically refer to death qualification, it does support that process. CrR 6.4(c)(2) provides that "RCW 4.44.150 through RCW 4.44.200 shall govern challenges for cause." Those provisions include RCW 4.44.170(2). In addition, our cases have consistently upheld the process of death qualification even without a statute which specifically refers to it.[197]

Appellant's reliance upon *Witherspoon* is misplaced. Although the Supreme Court in that case evaluated an Illinois statute requiring death

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"No person whose opinions are such as to preclude him from finding any defendant guilty of an offense punishable with death shall be compelled or allowed to serves as a juror on the trial of any indictment or information for such an offense."

[196] *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).

[197] *E.g., Gentry*, 125 Wn.2d at 634; *Mak*, 105 Wn.2d at 707; *Hughes*, 106 Wn.2d at 180-88.

qualification, the case does not stand for the proposition that a specific statute is required to permit death qualification by the State. As Appellant acknowledges, the Supreme Court has stated there is not "any one right way for a State to set up its capital sentencing scheme."[198] The State points to the more recent Supreme Court decision of *Wainwright v. Witt*[199] in which the Court reviewed a trial court decision granting a challenge for cause in a capital case. The Court did not examine a death qualification statute, but found the trial court properly excused a juror for cause because of her views on the death penalty.[200]

RCW 4.44.170(2), CrR 6.4(c)(2) and our case law provide sufficient authority for death qualifying a jury. We reject Petitioner's argument that because there is no statutory authority for it, death qualification of jurors is unconstitutional.

Trial Court Exclusion of Jurors Challenged For Cause

(10) Whether certain prospective jurors were properly excused for cause.

Appellant claims the trial court abused its discretion in excusing prospective jurors Ms. Lisa Denis, Ms. Kristin A. Henderson and Richard Deal upon challenges for cause by the State.

[46, 47] A trial court's ruling on challenge of a prospective juror for cause is reviewed for manifest

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[198] *Spaziano v. Florida*, 468 U.S. at 464.

[199] *Wainwright v. Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

[200] *Witt*, 469 U.S. at 430.

abuse of discretion.[201] This Court gives deference to the trial court's finding that a prospective juror's views on the death penalty will prevent that person from trying the case fairly and impartially.[202] This is because "[t]he trial judge is in the best position upon observation of the juror's demeanor to evaluate the responses and determine if the juror would be impartial."[203] In *Wainwright v. Witt* the Supreme Court quoted from *Reynolds v. United States* that "the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. . . ."[204]

[48] The standard for ruling on challenges for cause in a death penalty case is whether the prospective juror's views would prevent or substantially impair the performance of that person's duties as a juror according to instructions and the oath taken by jurors.[205]

Voir Dire of Ms. Lisa Denis

When questioned on voir dire about whether she had ever made a life or death decision, Ms. Lisa

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[201] *Brett*, 126 Wn.2d at 158; *Gentry*, 125 Wn.2d at 634 (citing *State v. Rupe*, 108 Wn.2d 734, 759, 743 P.2d 210 (1987), *cert. denied*, 486 U.S. 1061 (1988)); *Mak*, 105 Wn.2d at 707.

[202] *Gentry*, 125 Wn.2d at 634 (citing *Wainwright*, 469 U.S. at 425-26; *In re Lord*, 123 Wn.2d 296, 309, 868 P.2d 835 (1994)).

[203] *Brett*, 126 Wn.2d at 158 (citing *Rupe*, 108 Wn2d at 749).

[204] *Witt*, 469 U.S. at 428 n.9 (quoting *Reynolds v. United States*, 98 U.S. 145, 156-57, 25 L. Ed. 244 (1878)).

[205] *Brett*, 126 Wn.2d at 157; *Gentry*, 125 Wn.2d at 635; *Wainwright*, 469 U.S. at 424.

Denis answered "No. I don't know . . . I don't know if I could vote, I don't know if I could."[206] She also indicated the death penalty "would be a very difficult position" for her.[207] Defense counsel asked her "[D]o you think that you could follow [the judge's] instructions to consider the possibility of a death penalty as a sentence?" She answered "Oh, yeah, I could follow the instructions. I think that-actually making that decision, no."[208] The court asked Ms. Denis if, given her knowledge, background and opinion, she could actually vote to impose the death penalty. Ms. Denis replied "I don't think I could. It would have to be so crystal clear. It would just have to be-[.]"[209]

The trial court did not abuse its discretion in excusing Ms. Denis for cause. The record supports the court's finding that her views about the death penalty would have substantially impaired her ability to follow the court's instructions.

Voir Dire of Ms. Kristin A. Henderson

On voir dire, Ms. Kristin A. Henderson agreed she could follow the court's instructions and make a decision under the law. But she also voiced strong feelings against the death penalty. She said she felt the death penalty made "brutes of us all" and was "barbaric."[210] The court asked if she would seriously be willing to consider both the alternatives of life

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[206] Report of Proceedings at 79, Nov. 4, 1993.

[207] Report of Proceedings at 79, Nov. 4, 1993.

[208] Report of Proceedings at 84, Nov. 4, 1993.

[209] Report of Proceedings at 93, Nov. 4, 1993.

[210] Report of Proceedings at 95, Nov. 3, 1993.

without possibility of parole and the death penalty, given her strong feelings. She replied "It would be difficult. I mean, I can see myself, I guess I could express it in body language perhaps. Pardon me. I would be sitting there like this."[211]

The trial court did not abuse its discretion in excusing Ms. Henderson for cause because her oral responses and body language showed she would be substantially impaired in performing her duties as a juror.

Voir Dire of Richard Deal

Appellant did not object at trial to the State's challenge of Richard Deal for cause. At any rate, Mr. Deal was properly excused. On voir dire he indicated he would impose the death penalty where the defendant "would reviolate if released," which is not a correct statement of the law. He also misunderstood the State's burden of proof in a criminal case and understood it to be "beyond a shadow of a doubt," although he was corrected later. The trial court did not abuse its discretion in excusing Mr. Deal for cause.

Jury Instructions on Premeditation and Intent

(11) Whether the terms "premeditation" and "intent" were sufficiently explained in the trial court's instructions to the jury.

Appellant contends the trial court committed reversible error by not instructing the jury that premeditation and intent are separate elements of aggravated first degree murder. He assigns error to

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[211] Report of Proceedings at 101, Nov. 3, 1993. Ms. Henderson crossed her arms, held her hand up and sat back.

the court giving Instruction 11 defining premeditation:

> Premeditation means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.[212]

Instruction 11 is Washington Pattern Instruction (Criminal) (WPIC) 26.01, which we have upheld in other capital cases.[213] Appellant objected to Instruction 11 at trial and argues the trial court should instead have given his proposed Instruction 7 which read:

> Intent and premeditation are not synonymous. Premeditation cannot simply be inferred from the existence of a criminal intent.
>
> Premeditation involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short. Although no specific period of time is required, sufficient time must have elapsed to allow deliberate formation of

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[212] Clerk's Papers at 1423.

[213] *State v. Rice*, 110 Wn.2d 577, 603, 757 P.2d 89 (1988), *cert. denied*, 491 U.S. 910 (1989); *State v. Benn*, 120 Wn.2d 631, 657-58, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).

> the intent to act and reflection upon the act intended. Premeditation necessarily involves an appreciable length of time.[214]

[49-52] Errors in instructions are reviewed de novo.[215] Jury instructions are to be read as a whole and each instruction is read in the context of all others given.[216] "[A] specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case."[217] The court need not give a party's proposed instruction if it is repetitious or collateral to instructions already given.[218]

[53] A review of the instructions given in this case satisfies us the trial court did not err. In addition to Instruction 11, the court defined "intent" in Instruction 26, WPIC 10.01, which reads: "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime."[219] Instruction 26 is almost identical to RCW 9A.08.010(1)(a).[220] The court also gave Instruction 10:

> To convict the defendant of the crime of first-degree premeditated murder, each of the following elements of the crime must be proved beyond a reasonable doubt:

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[214] Clerk's Papers at 1175.

[215] *Brett*, 126 Wn.2d at 171.

[216] *Id.*; *Gentry*, 125 Wn.2d at 603.

[217] *Rice*, 110 Wn.2d at 603.

[218] *Benn*, 120 Wn.2d at 655.

[219] Clerk's Papers at 1438.

[220] RCW 9A.08.010(1)(a)

> (1) That on or about the 24th day of May, 1991, the defendant caused the death of Holly Washa;
>
> (2) That the defendant acted with intent to cause the death of Holly Washa;
>
> (3) That the intent to cause the death was premeditated; and
>
> (4) That the acts occurred in King County, Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

A reading of Instructions 10, 11 and 26 indicates the court instructed the jury that "premeditation" and "intent" were separate elements of aggravated first degree murder.[221] The instructions adequately follow the law in defining premeditation and intent. The trial court thus was not required to give Appellant's proposed Instruction 7. The court did not commit reversible error in giving Instruction 11 and refusing to give Appellant's proposed Instruction

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[221] RCW 9A.32.030(1)(a) provides:

"**Murder in the first degree**. (1) A person is guilty of murder in the first degree when:

"(a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person. . . ."

7.

AGGRAVATING FACTORS

(12) Whether the trial court properly instructed the jury concerning the aggravating factors in the case.

Insufficiency of Evidence

The State charged Appellant with aggravated first degree murder by committing first degree murder in the course of, in furtherance of, or in immediate flight from robbery in the first or second degree, rape in the first or second degree, and kidnapping in the first degree.[222]

Appellant contends there was not sufficient evidence to prove he killed Ms. Holly C. Washa during, in the course of, in furtherance of, or in immediate flight from the crimes of robbery, rape, or kidnapping. He thus claims he was denied due process when the trial court denied his motion to dismiss the aggravated murder charge, in which he claimed there was insufficient evidence of the aggravating circumstances of rape and robbery at the close of the State's case in the guilt phase.

[54] In challenges to the sufficiency of evidence to prove an aggravating factor in

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[222] Clerk's Papers at 1. Under RCW 9A.32.030(1)(a), a person is guilty of murder in the first degree, when, with premeditated intent to cause the death of another person, the accused causes the death of that person or of a third person. RCW 10.95.020(9) provides that a person is guilty of aggravated first degree murder by committing first degree murder "in the court of, in the furtherance of, or in immediate flight from . . . (a) Robbery in the first or second degree; (b) Rape in the first or second degree . . . 9d) Kidnapping the first degree[.]"

aggravated murder, this Court must view the evidence most favorably towards the nonmoving party to determine whether any rational trier of fact could have found the presence of the aggravating factor beyond a reasonable doubt.[223]

[55] To establish that a killing occurred in the course of, in furtherance of, or in immediate flight from a felony, there must be an "intimate connection" between the killing and the felony.[224] The killing must be part of the "res gestae " of the felony, that is, in "close proximity in terms of time and distance." A "causal connection" must clearly be established between the two.[226] In other words, "more than a mere coincidence of time and place is necessary."[227]

The trial court in this case relied primarily upon *State v. Leech*[228] and *State v. Dudrey*[229] in denying Appellant's motion to dismiss the aggravated murder charge. This Court in *Leech* declined to apply a literal reading of "in furtherance of." In that case, a fire fighter died while fighting a fire set by the defendant. The defendant, charged with felony murder, argued his act of arson ended

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[223] *Brett*, 126 Wn.2d at 166.

[224] *State v. Golladay*, 78 Wn.2d 121, 132, 470 P.2d 191 (1970), *overruled on other grounds, State v. Arndt*, 87 Wn.2d 374, 378, 553 P.2d 1328 (1976).

[226] *Golladay*, 78 Wn.2d at 130.

[227] 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.5, at 225 (1986) (discussing "casual connection" necessary between felony and murder in felony murder cases).

[228] *Leech*, 114 Wn.2d 700.

[229] *Dudrey*, 30 Wn. App. 447.

once he set the fire and that any death caused by the fire was not within the res gestae or "in furtherance of" that crime. But we concluded that because the fire fighter died while the arson fire was still engaged, his death was sufficiently close in time and place to the arson to be within the res gestae of that felony.

The Court of Appeals, Division Three, in *Dudrey*, another felony murder case, concluded the killing was part of the res gestae of the felony where a burglary and a killing were closely related and occurred at about the same time and place. The defendant and a friend planned to burglarize the victim's home, where they knew she was sleeping. She awoke when the defendant threw a rock through the window. As she investigated, she was killed by either the defendant or his friend. The court found there was an "intimate and close connection" between the homicide and the burglary.[230]

But in *State v. Golladay*[231] this Court found no intimate connection between a homicide and a larceny allegedly committed by the defendant. The defendant claimed he gave the victim and her male companion a ride in his automobile. He stated he then dropped them off. Later, while still driving, he accidentally hit an embankment. Witnesses at the accident scene saw him dispose of the victim's purse and shoes. The victim was later found dead. We determined the larceny was separate, distinct, and independent from the homicide. We concluded there was no "legal relation" between the killing and the larceny, pointing to the fact the larceny occurred

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[230] *Id.* at 450.

[231] *Id.*

after the killing[232] and that the killing was not within the res gestae of the larceny.[233]

Neither *Leech*, *Dudrey* nor *Golladay* completely addresses the specific issue raised by Appellant. He argues the killing of Ms. Washa was not in furtherance of either the rape or robbery because the killing occurred "hours" after those crimes were committed or completed, and thus the killing would not be within the res gestae of those crimes, or the killing was not committed to "further" those crimes. In *Leech, Dudrey* and *Golladay,* the killings and related felonies occurred within close proximity of time and place. In the circumstances presented by this case, the felonies occurred sometime within a two-day period, presumably "hours" before the actual killing.

Although Appellant claims his killing of Ms. Washa did not "further" the rape, robbery or kidnapping, following *Leech* we will not apply too literal an interpretation of "in furtherance of," but will look instead to whether the killing was part of the res gestae of the felony. We have also recognized the need for a "causal" or "intimate" connection between a killing and a related felony to establish the killing was committed in the course of, in furtherance of, or in immediate flight from the felony.

The record in this case supports our conclusion that Appellant's killing of Ms. Holly C. Washa was within the res gestae or had a "causal connection" to the rape, robbery and kidnapping. The crimes are

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[232] *Golladay*, 78 Wn.2d at 131.

[233] *Id.*

linked by Appellant's motive to obtain money to pay for his California trip. He made plans to meet Ms. Susan J. Schnell in Palm Springs, California and admitted to California police that he kidnapped Ms. Washa because he needed money to go there. He held Ms. Washa captive after robbing her. He told the Palm Springs police he had thought about robbing someone and letting that person go but "it would be just the same as waltzing into a bank and have my picture taken." He held Ms. Washa captive for two days and raped and tortured her during that time. He admitted killing her because he did not want to leave a witness alive. Immediately after killing Ms. Washa, Appellant went to California. The killing and other felonies are intimately connected. From the beginning of Appellant's criminal acts against Ms. Washa, he was not separated from her until he killed her and left for California.

Viewing the record in the light most favorable to the State leads us to conclude there was sufficient evidence from which any rational trier of fact could have found beyond a reasonable doubt that the murder in this case was committed in furtherance of, in the course of, or in immediate flight from rape, robbery and kidnapping.[234] The trial court did not err in denying Appellant's motion to dismiss his aggravated murder charge. Appellant was not

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[234] Appellant conceded at trial the kidnapping was a continuing course of conduct and the killing was committed "in immediate flight from" the kidnapping. The record shows he kept Ms. Washa captive until her death. Thus, the kidnapping did not terminate until Appellant killed her and immediately left for California. The killing was committed "in the course of" and "in immediate flight from" the kidnapping.

denied due process.

Jury Instructions

Appellant asserts the trial court committed reversible error and denied him due process by not instructing the jury on "in the course of," "in furtherance of," and "in immediate flight" as elements of the aggravating factors, as he proposed at trial. Appellant also complains the trial court erred in not giving that proposed instruction when, on December 9, 1993, the jury during deliberations asked in writing "Do we have a (legal) definition of in Furterance off [sic] and or Imidiate [sic] flight."[235] The court refused the defense request for the proposed instruction and told the jury, after affording all counsel an opportunity to consider it, "You have all of your instructions in this area. No further instructions will be given."[236]

[56, 57] Considering the jury's request, Appellant complains the phrases "in the course of," "in furtherance of," "in flight from," and "immediate flight" are technical terms in the context of this case and the court should have instructed the jury concerning them. A term is "technical" when it has a meaning that differs from common usage.[237] The phrases here are not defined by statute. No appellate court has defined them and no pattern jury instructions address them. We conclude the phrases are expressions of common understanding to be given meaning from their common usage.

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[235] Clerk's Papers at 1410.

[236] *Id.*

[237] *See State v. Scott*, 110 Wn.2d 682, 694, 757 P.2d 492 (1988) (Utter, J., dissenting).

[58] Trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of ordinary understanding or self-explanatory.[238] For example, upon request, the trial court must give instructions on the statutory meaning of "intent."[239] But jury instructions need not define terms such as "common scheme or plan,"[240] "single act,"[241] "leniency,"[242] or "mitigating circumstances."[243]

This Court has recognized that "[t]rial courts should exercise sound discretion to determine the appropriateness of acceding to requests that words of common understanding be specifically defined."[244] And when a jury has begun deliberating, the trial court also has discretion to determine whether to give further instructions upon request.[245] The trial court in this case properly exercised its discretion by not giving Appellant's proposed instructions defining the phrases "in the course of," "in furtherance of," or "in immediate flight from" a felony.

[59] Appellant also claims the court's refusal to define those phrases violated his due process

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[238] *State v. Allen*, 101 Wn.2d 355, 358, 678 P.2d 798 (1984); *Scott*, 110 Wn.2d at 689.

[239] *Allen*, 101 Wn.2d at 361-62.

[240] *Benn*, 120 Wn.2d at 673-74; *State v. Jeffries*, 105 Wn.2d 398, 420, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986).

[241] *Benn*, 120 Wn.2d at 674.

[242] *Id.*

[243] *State v. Bartholomew*, 101 Wn.2d 631, 647, 683 P.2d 1079 (1984).

[244] *Scott*, 110 Wn.2d at 692 (citation omitted).

[245] *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988).

rights because they were "essential elements of the aggravators." And he argues jury instructions omitting essential elements of the crime prevent an accused from arguing its theory of defense and requires reversal. Even assuming those phrases are essential elements of the crimes charged, this Court has recognized that failure to give a definitional instruction is not failure to instruct on an essential element.[246] The record in this case shows the trial court instructed the jury on all essential elements of the crimes charged.[247] The defense was not prevented from arguing its theory of the case. Appellant's claim is without merit.

The trial court did not commit reversible error or violate Appellant's due process rights by not giving instructions defining "in the course of," "in furtherance of," or "in immediate flight from" a felony.

Penalty Phase Instructions

(13) Whether the trial court erred during the penalty phase in refusing to give the jury certain instructions proposed by the defense.

Appellant claims the trial court erred by not giving several of his proposed penalty phase instructions to the jury.[248] To support his claim, he argues Washington is a "weighing state" and his proposed instructions were necessary to

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[246] *Scott*, 110 Wn.2d at 690.

[247] *See* Clerk's Papers at 1411-41 ("Court's Instructions to the Jury").

[248] See Appellant's proposed instructions P-9A, P-9B, P-11, P12, P-13, P-17, P-21, P-22 and P-23.

appropriately channel the jury's discretion during sentencing. And, he asserts, without his proposed instructions, the jury's decision was "an illusion of rational decisionmaking" in violation of the 8th and 9th Amendments to the United States Constitution and Washington Constitution, article I, section 14.

Weighing and Non-weighing Death Penalty Statutes

The United States Supreme Court has classified state death penalty statutes as either "non-weighing" or "weighing."[249] The terms refer to the process in a death penalty case in which the sentencer considers or weighs a variety of factors in deciding whether to impose the death penalty.[250]

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[249] *Compare Zant v. Stephens*, 462 U.S. 862, 873-80, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) (reviewing Georgia's "non-weighing" death penalty statute) *with Stringer v. Black*, 503 U.S. 222, 229-35, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992) (concluding Mississippi has a "weighing" death penalty statute).

[250] In *Williams v. Calderon*, 52 F.3d 1465, 1478 n.11-13 (9th Cir.1995), *cert. denied*, 516 U.S. 1124 (1996), the United States Court of Appeals for the Ninth Circuit noted states with weighing or non-weighing death penalty statutes, according to state and federal court decisions.

The following states were identified or treated as having "non-weighing" death penalty statutes: **Georgia**, *Zant v. Stephens*, 462 U.S. 862 (1983) (GA. CODER ANN. § 17-10-30 (Michie 1994)); **Illinois**, *People v. Todd*, 154 Ill. 2d 57, 607 N.E.2d 1189, 1197-98 (1992) (ILL. COMP. STAT. § 5/9-1 (1992)), *cert. denied*, 510 U.S. 944, 114 S. Ct. 381, 126 L. Ed. 2d 331 (1993); **Kentucky**, *Wilson v. Commonwealth*, 836 S.W.2d 872, 891 (Ky.1992) (KY. REV. STAT. ANN. § 532.025 (Michie 1994)), *cert. denied*, 507 U.S. 1034, 113 S. Ct. 1857, 123 L. Ed. 2d 479 (1993); **Louisiana**, *Ward v. Whitley*, 21 F.3d 1355, 1365 (5th Cir. 1994) (LA. CODE. CRIM. PROC. ANN. art. 905.3-.4 (West 1994)), *cert. denied*, 513 U.S. 1192, 115 S. Ct. 1257, 131 L. Ed. 2d 137 (1995); **Virginia**, *Briley v. Bass*, 742 F.2d 155, 166 (4th Cir.) (VA. CODE ANN. §§ 19.2-264.2, 19.2-264.4

(Michie 1994)), *cert. denied,* 469 U.S. 893, 105 S. Ct. 270, 83 L. Ed. 2d 206 (1984); **Delaware**, *Bailey v. Snyder,* 855 F. Supp. 1392, 1408-10 (D. Del.1993) (DEL. CODE ANN. tit. 11, § 4209 (1994)) aff'd, 68 F.3d 736 (3rd Cir.1995), *cert. denied,* 516 U.S. 1088 (1996) and **Missouri**, *State v. LaRette,* 648 S.W.2d 96, 102 (Mo.), (MO. ANN. STAT. §§ 565.030, 565.032 (Vernon 1994)). *cert. denied,* 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983).

The following states were identified or treated as having "weighing" death penalty statutes: **Alabama**, *Lawhorn v. State,* 581 So.2d 1159, 1176 (Ala. Crim. App.1990) (ALA. CODE §§ 13A-5-46 to -49 (1994)), *aff'd, Ex parte Lawhorn,* 581 So.2d 1179 (Ala.1991) *cert. denied,* 502 U.S. 970 (1991); **Arizona**, *Richmond v. Lewis,* 506 U.S. 40, 45-49, 113 S. Ct. 528, 534-35, 121 L. Ed. 2d 411 (1992) (ARIZ. REV. STAT. ANN. § 13-703 (1994)); **Arkansas**, *Ford v. Lockhart,* 861 F. Supp. 1447, 1453 (E.D. Ark. 1994) (ARK. CODE ANN. §§ 5-4-602 to -604 (Michie 1994)); **Colorado**, *People v. White,* 870 P.2d 424, 447-49 (Colo.) (COLO. REV. STAT. § 16-11-103 (1994)), *cert. denied,* 513 U.S. 841, 115 S. Ct. 127, 130 L. Ed. 2d 71 (1994); **Florida**, *Parker v. Dugger,* 498 U.S. 308, 318, 111 S. Ct. 731, 737-38, 112 L. Ed. 2d 812 (1991) (FLA. STAT. ANN. § 921.141 (West 1995)); **Indiana**, *Bellmore v. State,* 602 N.E.2d 111, 129-30 (Ind.1992) (IND. CODE ANN. § 35-50-2-9 (Michie 1994)); **Mississippi**, *Stringer v. Black,* 503 U.S. 222, 229-30, 112 S. Ct. 1130, 1136, 117 L. Ed. 2d 367 (1992) (MISS. CODE ANN. § 99-19-101 (1993)); **Nebraska**, *State v. Reeves,* 239 Neb. 419, 476 N.W.2d 829, 836 (1991) (NEB. REV. STAT. §§ 29-2522 to 29-2523 (1993)), *cert. denied,* 506 U.S. 837, 113 S. Ct. 114, 121 L. Ed. 2d 71 (1992); **Nevada**, *Canape v. State,* 109 Nev. 864, 859 P.2d 1023, 1031-35 (1993) (NEV. REV. STAT. §§ 200.030, 200.033 (1993)), *cert denied,* 513 U.S. 862, 115 S. Ct. 176, 130 L. Ed. 2d 112 (1994); **New Mexico**, *State v. Henderson,* 109 N.M. 655, 789 P.2d 603, 609-10 (1990) (N.M. STAT. ANN. §§ 31-20A-2, 31-20A-5 (Michie 1995)); **North Carolina**, *Smith v. Dixon,* 14 F.3d 956, 974 (4th Cir.) (en banc) (N.C. GEN. STAT. § 15A-2000 (1994)), *cert. denied,* 513 U.S. 841, 115 S. Ct. 129, 130 L. Ed. 2d 72 (1994); **Ohio**, *State v. Davis,* 38 Ohio St.3d 361, 528 N.E.2d 925, 933 n.11 (1988) (OHIO REV. CODE ANN. §§ 2929.03-.04 (Anderson 1993)), *cert. denied,* 488 U.S. 1034, 109 S. Ct. 849, 102 L. Ed. 2d 980 (1989); **Oklahoma**, *Stafford v.*

In weighing states, such as Arizona or Mississippi, aggravating factors are weighed against mitigating evidence. The death penalty may be imposed only where specified aggravating factors outweigh all mitigating evidence.[251] For example, under Arizona's statute, the sentencer is required to evaluate both mitigating and aggravating circumstances and impose the death penalty if it finds one or more aggravating circumstances specified in the statute and finds no sufficiently substantial mitigating circumstances in favor of leniency.[252] The Supreme Court read it as requiring the sentencer to weigh both circumstances to determine the relative "substan[ce]" of the two.[253]

Saffle, 34 F.3d 1557, 1568 (10th Cir.1994) (OKLA. STAT. ANN. §§ 701.10-.12 (West 1995)) *cert. denied* 514 U.S. 1099, 115 S. Ct. 1830, 131 L. Ed. 2d 751 (1995); **Pennsylvania**, *Commonwealth v. Holcomb*, 508 Pa. 425, 498 A.2d 833, 849-51 & n.16 (1985) (42 PA. CONS. STAT. ANN. § 9711 (1994)), *cert. denied*, 475 U.S. 1150, 106 S. Ct. 1804, 90 L. Ed. 2d 349 (1986); **Tennessee**, *State v. Howell*, 868 S.W.2d 238, 259-62 (Tenn.1993) (TENN. CODE ANN. § 39-13-204 (1994)), *cert. denied*, 510 U.S. 1215, 114 S. Ct. 1339, 127 L. Ed. 2d 687 (1994); **Utah**, *State v. Archuleta*, 850 P.2d 1232, 1247-48 (Utah) (UTAH CODE ANN. §§ 76-3-207, 76-5-202 (1994), as interpreted by *State v. Pierre*, 572 P.2d 1338, 1347-48 (Utah 1977)), *cert. denied*, 510 U.S. 979, 114 S. Ct. 476, 126 L. Ed. 2d 427 (1993); **Wyoming**, *Zant v. Stephens*, 462 U.S. 862, 874 n.12, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) (WYO. STAT.ANN. § 6-2-102 (Michie 1988)), as interpreted by *Hopkinson v. State*, 632 P.2d 79 (Wyo. 1981), *cert. denied*, 455 U.S. 922, 102 S. Ct. 1280, 71 L. Ed. 2d 463 (1982).

[251] *E.g., Parker v. Dugger*, 498 U>S. 308, 318, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991).

[252] *Richmond v. Lewis*, 506 U.S. 40, 47, 113 S. Ct. 528, 121 L. Ed. 2d 411 (1992).

[253] *Id.*

In weighing states, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if the other aggravating factors are valid.[254] This conclusion arises from the assumption that the weighing process has been "skewed." An invalid aggravating factor creates the possibility the sentencer may be biased in favor of the death penalty, based upon an illusory circumstance.[255] And "a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale."[256] Thus, an aggravating factor should give principled guidance to the sentencer to assure that determining whether a human life should be taken is not a product of "unbridled discretion."

[60] In contrast, in a non-weighing state, like Georgia, the fact finder considers all the circumstances from both the guilt phase and penalty phase in deciding the penalty.[257] These circumstances relate to both the crime and the defendant. In Georgia, for example, the jury must find at least one aggravating factor before imposing a death sentence, but the aggravating factors do not have a specific function in the jury's decision whether to impose the death penalty. The fact finder or sentencer is not required to weigh mitigating factors against aggravating factors.[258]

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[254] *Id.* at 46.

[255] *Stringer*, 503 U.S. at 236.

[256] *Stringer*, 503 U.S. at 232.

[257] *Id.* at 230 (discussing Georgia death penalty statute).

[258] *Id.* at 233 (discussing Louisiana death penalty statute).

Appellant urges us to determine Washington is a "weighing" state. But Washington's death penalty statute actually aligns this state with "non-weighing" states. At sentencing, the jury must answer only the statutory question "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"[259] The statute does not require the jury to weigh specified aggravating factors against mitigating factors. And, as in other non-weighing states, a jury in Washington considers not only the crime proved, but all the evidence presented in both the guilt and penalty phases.[260]

Appellant concedes this Court has not previously analyzed Washington's death penalty statute under the United States Supreme Court's weighing or non-weighing classification. By citing Washington cases which employ the words "weigh" or "weighs" or "outweighed," he attempts to convince this Court to implicitly recognize RCW 10.95 *et seq.*, as a "weighing" statute. We are not convinced.

In *Williams v. Calderon*[261] the United States Court of Appeals for the Ninth Circuit reasoned that:

> [T]he Supreme Court's weighing/non-weighing distinction may involve both

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[259] RCW 10.95.060(4).

[260] RCW 10.95.060; RCW 10.95.070. *See State v. Jeffries*, 105 Wn.2d 398; *State v. Mak*, 105 Wn.2d 692.

[261] *Williams v. Calderon*, 52 F.3d 1465, 1477-78 (9th Cir. 1995) (footnotes omitted), *cert. denied*, 516 U.S. 1124 (1996).

> procedural and substantive components. Procedurally, is the sentencer restricted to a "weighing" of aggravation against mitigation? Substantively, is the sentencer prevented from considering evidence in aggravation other than discrete, statutorily-defined factors? Our review of federal and state court decisions reveals that where both constraints are present, the regimes involved are uniformly treated as weighing; where neither is present, the regimes are uniformly treated as non-weighing. . . .

Applying the *Williams* approach to our death penalty statute supports our conclusion that RCW 10.95 *et seq.* is a "non-weighing" statute.[262] Under the statute, the jury is not restricted to weighing aggravating factors against mitigating factors, but may consider all evidence presented during both the guilt and penalty phases. The jury may also consider non-statutory aggravating factors.[263]

Penalty Phase Instructions

Appellant argues the trial court erred by not giving his proposed instructions P-9A, P-9B, 11, 12, 13, 17, 21, 22, and 23 during the penalty phase. He

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[262] In *Campbell v. Blodgett*, 978 F.2d 1502, 1512-13 (9th Cir. 1992), the United States Court of Appeals for the Ninth Circuit determined that nothing in RCW 10.95 suggests the jury is required to engage in a balancing test, or impose the death penalty after finding the factors "in balance."

[263] *E.g.*, *State v. Gentry*, 125 Wn.2d 570 (victim impact evidence); *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984) (adult convictions and juvenile court adjudications of guilty); *Delo v. Lashley*, 507 U.S. 272, 113 S. Ct. 1222, 122 L. Ed. 2d 620 (1993) (unadjudicated criminal conduct).

claims his proposed instructions were necessary to meet the constitutional requirement that the discretion of the jury be adequately focused by clear and objective standards.

[61-63] An instruction must correctly state applicable law.[264] The trial court does not err in refusing to give an instruction when, evaluated in the context of all the instructions, it is collateral to or repetitious of those already given.[265] A jury is presumed to follow instructions given.[266] Jury instructions are sufficient if they correctly state applicable law, are not misleading, and permit counsel to argue their theory of the case.[267]

[64] Claimed errors at the penalty phase of a capital case are reviewed under heightened scrutiny. This requires an appellate court to review the record more carefully, but does not entail a different standard of review.[268]

[65] Appellant's proposed Instructions P-9A and P-9B sought to remind the jury of the limited purpose for which certain evidence had been admitted, including Ms. Brieanna C. West's testimony, Ms. Jan M. Gray's testimony, and the events in California. As Appellant acknowledged in those proposed instructions, the court had already given those instructions to the jury in the guilt

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[264] *Benn*, 120 Wn.2d at 654.

[265] *Id.* at 655.

[266] *State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1992).

[267] *Benn*, 120 Wn.2d at 654-55.

[268] *Brett*, 126 Wn.2d at 182.

phase.[269] The trial court did not err in refusing to give Appellant's proposed instructions P-9A and 9-9B again in the penalty phase.

In Appellant's proposed Instruction P-11, he identified as the "crime" the jury was to have in mind the elements of premeditated first degree murder and the aggravating circumstances found by the jury in the guilt phase. It further instructed the jury "You must not consider any other feature of the crime that is not necessarily reflected in the elements and aggravating circumstances." That is a misstatement of the law.

[66] Under RCW 10.95.070, the jury may consider other factors at the beginning of the special sentencing process, including [2] whether the murder was committed while the defendant was under the influence of extreme mental disturbance; [3] whether the victim consented to the act of murder; [5] whether the defendant acted under duress or domination of another person; and [8] whether there is a likelihood the defendant will pose a danger to others in the future. It is not unconstitutional for the jury to consider the circumstances of the crime for which Appellant was convicted.[270] Thus, the trial court did not err in refusing to give Appellant's proposed Instruction P-11.

Appellant's proposed Instruction P-12 states that the phrase "having in mind the crime of which the defendant has been found guilty" was "intended

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[269] Clerk's Papers at 1419-20 (Instruction 7 and Instruction 8).

[270] *See Tuilaepa v. California*, 512 U.S. 967, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994).

merely to provide a context for [the jury's] determination" of the death penalty. That misstates the law and is misleading. Under RCW 10.95.060(4) in answering the question on leniency, the jury is required to "hav[e] in mind the crime of which the defendant has been found guilty. . . . " The jury may thus consider all the evidence submitted in the guilt phase proving the crime the defendant committed. It is not correct to state the question is merely a context for the jury's consideration.

Proposed Instruction P-12 also stated the jury must "not weigh the crime, any of its elements, any aspect of it or any circumstance surrounding it against the mitigating evidence" and that its "sole focus" should be whether there were insufficient mitigating circumstances to merit leniency. However, under non-weighing statutes, such as Washington's RCW 10.95, "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision."[271] The jury was correctly instructed by the court to consider all the evidence from both the guilt and penalty phases, and not just whether there were insufficient mitigating circumstances.

Appellant's proposed Instruction P-13 states "The number and nature of the aggravating factors found by you in the first phase of these proceedings should have no effect on your decision regarding the question posed by these instructions." This instruction is misleading and confusing. The jury was required to "have in mind" the crimes committed by Appellant, which included the aggravating factors found during the guilt phase. The trial court also

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[271] *Tuilaepa*, 114 S. Ct. at 2638.

instructed the jury it was to consider the evidence submitted during both the guilt phase and penalty phase, which include the aggravating factors. The trial court did not err in refusing to give a proposed instruction which was misleading and contradicted instructions already given.

Four of Appellant's proposed instructions would advise the jury not to consider certain factors as "weighing" against any mitigating evidence presented. Those factors include (1) any impression they may have of the crime as heinous, depraved or cruel, or any related emotional response they have which weighs against any mitigating circumstance (P-17); (2) the future dangerousness of Appellant (P-21);[272] (3) the expense of imprisoning Appellant for life (P-22) and (4) the deterrence of others (P-23). However, as the State correctly observes, RCW 10.95 is not a weighing statute. Appellant's proposed instructions incorrectly assumed Washington is a "weighing" state and that the jury would weigh aggravating factors against mitigating factors in its decision.

[67] "[T]he Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances[.]"[273] The Constitution does not require the jury to ignore other possible aggravating factors to determine who will actually be sentenced to death.[274] "What is important at the

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[272] RCW 10.95.070(8) specifically provides that a jury may consider whether there is a likelihood the defendant will pose a danger to others in the future.

[273] *Zant*, 462 U.S. at 890.

[274] *Stringer*, 503 U.S. at 231.

selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime."[275]

Washington's death penalty statute properly provides for "categorical narrowing" of those eligible for the death penalty in the guilt phase and for individualized determination and appellate review.[276] Under RCW 10.95.020 the jurors consider statutory aggravating circumstances in the guilt phase to select the class of persons eligible for the death penalty. In this case the jurors found aggravating circumstances, among which were that Appellant killed Ms. Holly C. Washa in the course of, in furtherance of, or in immediate flight from the related felonies of rape, robbery and kidnapping.

The jury's determination was based upon evidence admitted at trial. The jury was instructed in the guilt phase not to permit "sympathy or prejudice" to influence their decision.[277] During the penalty phase, the court instructed the jury that the evidence it was to consider consisted of "testimony of the witnesses and the exhibits admitted into evidence in phase one [the guilt phase] of this trial and during this special sentencing hearing."[278] In addition, during the penalty phase, Appellant presented mitigating evidence to the jury. The jury heard evidence of Appellant's traumatic birth and difficult childhood. There was also testimony that Appellant suffered from anti-social personality

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[275] *Zant*, 462 U.S. at 879 (emphasis omitted).

[276] *Id.*

[277] Clerk's Papers at 1413 (Instruction 1).

[278] Clerk's Papers at 1581 (Instruction 1).

disorder, sexual sadism and manic syndrome. The jury was given full opportunity to consider those mitigating factors. Thus, Appellant's argument that the court's refusal to give his proposed instructions resulted in an unconstitutional "illusion of rational decisionmaking" is without merit.

RCW 10.95.130 requires this Court to determine upon review whether the death sentence was arbitrary, excessive, disproportionate, or brought about through passion or prejudice. In answering that inquiry in the negative, we conclude the trial court did not err in refusing to give Appellant's proposed sentencing phase instructions.

Criminal History

Appellant assigns error to the trial court's denial of his motion to exclude his criminal history during the penalty phase. However, our death penalty statute authorizes the jury to consider a defendant's prior criminal history in the penalty phase. RCW 10.95.070(1) states:

> In deciding the question posed by RCW 10.95.060(4), the jury . . .may consider any relevant factors, including but not limited to the following:
>
> (1) Whether the defendant has or does not have a significant history, either as a juvenile or as an adult, of prior criminal activity[.]

[68] During the penalty phase the State presented Appellant's criminal history limited to his record of convictions. This is constitutionally permissible.[279] The trial court did not err in denying

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[279] *E.g., State v. Bartholomew*, 101 Wn.2d at 640-41.

Appellant's motion to exclude his criminal history.

Notice of Special Sentencing Proceeding

(14) Whether Appellant was properly served with the Notice of Special Sentencing Proceeding required by RCW 10.95.040(2).

Appellant argues this Court should set aside his death sentence because there is no proof the State served him or his attorneys with its notice of intent to seek the death penalty. In support of his claim he relies upon RCW 10.95.040(3) and *State v. Dearbone,* 125 Wn.2d 173, 177, 883 P.2d 303 (1994).[280]

RCW 10.95.040 imposes upon the State specific requirements for notifying a defendant it intends to seek the death penalty. When a person is charged with aggravated first degree murder, the State must file a "notice of a special sentencing proceeding" to determine whether the death penalty should be imposed when there is reason to believe there are insufficient mitigating circumstances to merit leniency.[281] The State must file and serve the notice on the defendant or defendant's counsel within 30 days after arraignment unless the court extends or reopens the filing period upon showing of good

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[280] In Appellant's brief, the argument heading for this section states: "THE STATE FAILED TO SERVE ITS NOTICE OF INTENT TO SEEK THE DEATH PENALTY ON MR. BROWN OR HIS ATTORNEYS WITHIN 30 DAYS OF THE ARRAIGNMENT, REQUIRING THIS COURT TO STRIKE THE DEATH SENTENCE IN THIS CASE." Br. of Appellant at 55. However, in the argument section itself, Appellant only claims "there is absolutely no proof" the State served him or his attorneys. *Id.* at 56.

[281] RCW 10.95.040(1).

cause.[282] RCW 10.95.040(3) states that if the notice is not filed and served as provided under RCW 10.95.040, the State "may not request the death penalty."[283]

The record in this case shows the notice of special sentencing proceeding was properly filed on March 24, 1992 within 30 days after Appellant's arraignment on February 26, 1992.[284] But Appellant claims "there is absolutely no proof that the State ever served [him] or his attorneys with this Notice."[285] He notes "[t]here may be a hearing at which the Notice was served, but there is no evidence of which hearing that is in the clerk's papers."[286] RCW 10.95.040 requires the State to serve a defendant with the notice of special sentencing proceeding, but does not require proof of service. Appellant does not claim he was not served with the notice, but only there is no proof he was served. His argument is without merit.

Dearbone cited by Appellant is distinguishable from this case. In that case, the State did not serve defense counsel with the notice of special sentencing proceeding until four days after expiration of the time for service under RCW 10.95.040(2). The defendant moved to preclude the State from requesting the death penalty because of violation of RCW 10.95.040(2). The State then moved to reopen the time for service and served defense counsel

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[282] RCW 10.95.040(2).

[283] RCW 10.95.040(3).

[284] Clerk's Papers at 37.

[285] Br. of Appellant at 56.

[286] Br. of Appellant at 56, n.8.

another copy of the notice. The trial court found good cause for reopening the time for service and granted the State's motion, allowing the State to seek the death penalty. On review, this Court determined the State did not show good cause and reversed the trial court. In its reasoning, this Court stated that "filing and service of notice is mandatory-no notice, no death penalty."[287] In this case, Appellant did not raise the issue of service in the trial court, does not claim the notice was untimely served under RCW 10.95.040(2), and only bases his claim before this court on the fact there is no proof he was served. Appellant does not argue he was not served with the notice. *Dearbone* does not apply.

A review of the record supports a reasonable conclusion Appellant was properly served with the notice of special sentencing proceeding. On March 25, 1992, a day after the notice was filed, Appellant and one of his attorneys appeared before the court and signed an order setting trial date.[288] An omnibus hearing was also held on that date. The record does not show any objections concerning service of the notice. On June 5, 1992 Appellant filed a motion to set aside the notice of special sentencing proceeding to determine whether the death penalty should be imposed.[289] In the motion, Appellant argued the notice should be set aside for violation of RCW 10.95.040(1) because the State had information showing mitigating circumstances sufficient to merit leniency. At that time he made no claim the State

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[287] *State v. Dearbone*, 125 Wn.2d 173, 177, 883 P.2d 303 (1994).

[288] Clerk's Papers at 38, 47-49.

[289] Clerk's Papers at 275.

had not properly served him or his attorney with notice. His attorneys appeared numerous times before the trial court after March 24, 1992, but never raised the issue of service of the notice.

Appellant's claim that his death sentence should be set aside for absence of proof of service of notice under RCW 10.95.040 is without merit.

Reciprocal Discovery

(15) Whether Criminal Rule 4.7 (CrR 4.7) mandates reciprocal pretrial discovery of evidence relevant to the penalty phase in a capital case.

On cross appeal, the State assigns error to the trial court's ruling denying its pretrial motion to compel disclosure of Appellant's penalty phase mitigation evidence. The State argues this court should hold that CrR 4.7 mandates reciprocal pretrial discovery of information pertinent to the penalty phase of a capital case.

On February 12, 1993, the State filed a pretrial motion to compel disclosure of any mitigation evidence in Appellant's possession which he intended to present in the penalty phase of the trial.[290] In response the defense argued, among other things, that forced disclosure of this evidence before completion of the guilt phase of the trial might compromise one or more of Appellant's constitutional rights, such as the right against self incrimination.[291] The trial court denied the State's motion by order dated February 25, 1993, concluding that reciprocal

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[290] Clerk's Papers at 652-64.

[291] *Id.* at 665-80.

discovery of penalty phase evidence was not required before completion of the guilt phase of the trial.[292] The court did, however, order the defense to disclose before trial the identities of any experts it was consulting and planned to call as witnesses at sentencing, but did not allow the State to contact those persons.[293] The court observed that this disclosure would not "constitute waiver of any right to confidentiality or against self-incrimination. . . ."[294]

[69] In general, the scope of discovery is within the sound discretion of the trial court and its decisions will not be disturbed absent a manifest abuse of that discretion.[295] CrR 4.7, a reciprocal discovery rule, guides the trial court in the exercise of its discretion over discovery.[296] The rule applies to all "criminal proceedings."[297] The principle of "full and free" pretrial discovery underlies CrR 4.7 to provide adequate information for informed pleas and to "expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process. . . ."[298]

The State does not claim the trial court abused its discretion in making its discovery ruling. It asks

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[292] *Id.* at 686.

[293] *Id.*; Report of Proceedings at 26-34, Feb. 25, 1993.

[294] Clerk's Papers at 686.

[295] *State v. Yates*, 111Wn.2d 793, 797, 765 P.2d 291 (1988) (citing *State v. Mak*, 105 Wn.2d 692).

[296] *Id.*

[297] *See* CrR 1.1.

[298] *Yates*, 111 Wn.2d at 797 (quoting CRIMINAL RULES TASK FORCE, WASHINGTON PROPOSED RULES OF CRIMINAL PROCEDURE 77 (West Publ'g Co. ed. 1971)).

this court to hold that CrR 4.7 provides for reciprocal pretrial discovery of penalty phase evidence in capital trials subject only to the trial court's discretion over the scope of discovery. The State contends the general requirement of reciprocity in criminal discovery applies equally to the guilt and penalty phases of a capital case and, thus, that reciprocal pretrial discovery of penalty phase evidence is required. It cites in support of that contention the California Supreme Court decision of *People v. Mitchell.*[299]

In *Mitchell,* the court was asked to decide whether and to what extent California's general criminal discovery rule, requiring reciprocal pretrial discovery by the parties to a criminal action, was applicable to the penalty phase of a capital case. The rule had been enacted into law in 1990 by initiative and codified in CAL. PENAL CODE, § 1054 (West Supp. 1997). Section 1054.3 of the code requires criminal defendants and their attorneys to disclose to the prosecuting attorney the names and addresses of persons they intend to call "at trial," any relevant statements or reports of those persons, and any real evidence intended to be offered into evidence. The prosecuting attorney has similar obligations under the statute.[300]

The defendant in that case refused to provide the prosecution with any pretrial discovery pertinent to the penalty phase of his trial.[301] He argued, as

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[299] *People v. Mitchell*, 5 CAL. 4th 1229, 859 P.2d 102, 23 Cal. Rptr. 403 (1993).

[300] *Id.* at 1232 (referencing § 1054.1).

[301] *Id.*

Appellant did here,[302] that the discovery rule requiring reciprocity did not apply to the penalty phase of a capital case because the penalty phase was a sentencing hearing and not part of a criminal "trial" within the meaning of the rule.[303] The court rejected that argument and held that the penalty phase of a capital trial "is merely a part of a single, unitary criminal proceeding" and embraced within the concept of a "trial" or "criminal trial."[304]

The court in *Mitchell* found more persuasive the defendant's claim that premature disclosure of his penalty phase evidence might jeopardize his defense at the guilt phase of his trial and potentially violate his privilege against self-incrimination.[305] However, the court reasoned that such concerns could be eliminated by deferring a ruling on the prosecution's penalty phase discovery in appropriate cases pending completion of the guilt phase of the trial.[306] The court reasoned that trial courts possess broad discretion to order a general continuance of a prosecutor's discovery request upon a showing that the continuance is appropriate or necessary to protect a criminal defendant's constitutional rights.[307] A continuance might be based upon such considerations as the probable duration of the guilt phase, the likelihood that a guilty verdict with special circumstances will be returned, and the

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[302] Clerk's Papers at 669-70 n.1.

[303] *Mitchell*, 5 Cal. 4th at 1233.

[304] *Mitchell* at 1233-34.

[305] *Id.* at 1237.

[306] *Id.*

[307] *Id.* at 1238.

potential adverse effect disclosure could have on the guilt phase defense.[308] And where necessary, the court may permit such a showing to be made in camera.[309]

[70] *Mitchell* suggests a similar resolution in this case. Like the California discovery rule in *Mitchell,* CrR 4.7 is a general criminal discovery rule applicable to all "criminal proceedings."[310] In the absence of an express statutory provision to the contrary, it applies to criminal proceedings involving the death penalty as well.[311] The rule applies equally to the penalty phase of a capital case as it does to the guilt phase because the former is neither more nor less than the whole "single, unitary criminal proceeding."[312] Although Appellant argues that the penalty phase is a separate sentencing proceeding to which the discovery rules applicable to "criminal proceedings" do not apply, he has cited no authority for that conclusion.

The State's position on the discovery issue is nothing more than actual practice and is merely a restatement of the law which is not in genuine dispute in this case.

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[308] *Id.*

[309] *Id.*

[310] *See* CrR 1.1.

[311] RCW 10.95 governs criminal proceedings involving the death penalty in this state. RCW 10.95.060, which sets forth the procedure to be followed in the penalty phase of a capital case, does not address the subject of discovery. Nor is that subject addressed elsewhere in the statute. *See generally* RCW 10.95.

[312] *Mitchell,* 5 Cal. 4th at 1233.

Victim Impact Evidence

(16) Whether the trial court erred in refusing to admit victim impact evidence at the penalty phase of the trial.

The State relies upon *State v. Gentry*[313] in asserting the trial court erred in refusing to admit the testimony of Ms. Holly C. Washa's father as victim impact evidence. Our decision in *Gentry* had not been announced at the time of trial in this case.[314]

At the penalty phase, the State, in absence of the jury, made an offer of proof of testimony by John L. Washa concerning his daughter's interests and the impact of her murder upon her family. The trial court ruled the testimony was not admissible "under current law and current interpretation. . . ."[315] In *Gentry,* the trial court admitted a similar statement by the victim's father concerning his murdered daughter and the effect of the murder on her family. We agreed with that court's ruling:

> We . . . conclude that victim impact evidence is admissible in the sentencing phase of capital cases and that trial courts, which

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[313] *Gentry*, 125 Wn.2d 570 (1995).

[314] The State was aware the *Gentry* case was pending at the time. Report of Proceedings at 108, Dec. 15, 1993. In offering Mr. Washa's testimony the State explained: "While we wanted to push hard and ask this Court to allow this evidence in front of the jury, we understand that that would put this Court in a very difficult position, but we would like to preserve the issue and be able to cross-appeal it. So essentially what we're asking this Court to do is make a ruling at this time that we don't like so that we would be able to cross-appeal." *Id.*

[315] Report of Proceedings at 109, Dec. 15, 1993.

> are experienced in balancing the probative against the prejudicial, should exercise their informed discretion in deciding the scope of permissible victim evidence in a given case. In the case before us, there was no error in the admission of the victim's father's statements about his young murdered daughter or about the profound effect of the murder upon her family . . .victim impact evidence may properly include a description of the emotional trauma suffered by the victim's family.[316]

[71] If *Gentry* had been decided before the trial in this case, the trial court could have, in its discretion, admitted the testimony of John L. Washa as victim impact evidence at the penalty phase. But it would not have been error not to admit it. At any rate, the trial court did not commit error in denying victim impact evidence in this case.

SUMMARY AND CONCLUSIONS

(1) There was sufficient evidence to justify the affirmative finding by the jury that there were not sufficient mitigating circumstances to merit leniency. The sentence of death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The sentence of death was not brought about by passion or prejudice. Nor is the defendant mentally retarded.

(2) The proportionality review mandated by RCW 10.95.130(b) is not void for vagueness under either the Eighth or Fourteenth Amendments to the United States Constitution, nor under article I, §§ 3

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[316] *Id.* at 632-33.

and 14 of the Washington Constitution.

(3) None of the statements made by the prosecuting attorneys during either the guilt or penalty phases of the trial constituted prosecutorial misconduct requiring a new trial.

(4) The trial court did not abuse its discretion in admitting the testimony of Ms. Susan J. Schnell. Her testimony did not violate Evidence Rule 404(b), nor did it constitute double jeopardy.

(5) The trial court did not abuse its discretion in admitting the testimony of Ms. Jan M. Gray or Ms. Brieanna C. West. Their testimony merely served to establish the context of the case and was not prejudicial to Appellant.

(6) Appellant was adequately advised of his *Miranda* rights before giving statements to the Palm Springs, California police.

(7) The trial court did not err in admitting Appellant's statements which were recorded by the Palm Springs police without his knowledge or consent. The officers lawfully recorded the statements under California law and were not acting as agents of the King County police at that time. Thus RCW 9.73, Washington's Privacy Act, does not require suppression of that evidence. Suppressing the evidence would not further legitimate state interests and would only suppress highly probative evidence lawfully obtained in California.

(8) There is a record of "sufficient completeness" for adequate appellate review of Appellant's case.

(9) "Death qualification" of jurors does not violate the Washington Constitution, article I, §§ 21

and 22.

(10) The trial court properly exercised its discretion in excusing for cause prospective jurors Ms. Lisa Denis, Ms. Kristin A. Henderson and Richard Deal during voir dire. Their views would have prevented or substantially impaired their ability to follow the court's instructions and abide by their oaths as jurors.

(11) RCW 10.95.040 requires the State to serve a defendant with notice of its intent to seek the death penalty within 30 days of arraignment. The record supports a reasonable conclusion that Appellant was served in fact with the notice. The statute does not require proof of service. Thus, Appellant's claim that his death sentence should be set aside merely because there is no proof of service is without merit.

(12) Viewing the record in the light most favorable to the State, any rational trier of fact could have determined, beyond a reasonable doubt, that Appellant committed first degree murder in the course of, in furtherance of or in immediate**632* flight from robbery, rape and kidnapping. The court's refusal to give instructions defining "in furtherance of," "in the course of," or "in immediate flight from" was within its discretion and did not violate Appellant's due process rights.

(13) The record shows the trial court properly instructed the jury that premeditation and intent were separate elements of aggravated first degree murder.

(14) The trial court properly refused Appellant's proposed instructions P-9A, P-9B, P-11, P-12, P-13, P-17, P-21, P-22 and P-23 at the penalty

phase. P-9A, P-9B, P-11, P-12 and P-13 were misleading, repetitious, or misstatements of the law. The trial court's refusal of P-17, P-21, P-22 and P-23 did not render the jury's sentencing decision a product of irrational decision making. The jury received adequate instructions from the trial court. RCW 10.95 properly provides for "individualized determination" of the death penalty and appellate review to ensure the sentence is not imposed arbitrarily, disproportionately or as a result of passion or prejudice.

(15) CrR 4.7 mandates reciprocal pretrial discovery of evidence relevant to the penalty phase of a capital case.

(16) Our decision in *State v. Gentry* was filed only after the trial in this case. That decision allows victim impact testimony during the penalty phase of a capital case. Even under *Gentry* it would not have been error for the trial court to exercise its discretion not to allow victim impact testimony. The trial court did not err in denying victim impact testimony in this case.

We affirm the conviction and death sentence of Appellant Cal Coburn Brown in the King County Superior Court for the aggravated first degree murder of Ms. Holly C. Washa.

DURHAM, C.J., and DOLLIVER, GUY, JOHNSON and TALMADGE, JJ., concur.

MADSEN, J., (concurring in part, dissenting in part) - I concur with the majority that Cal Brown's conviction should be affirmed. However, I would hold the trial court erred in admitting the testimony of Ms. Schnell, the victim in a criminal encounter with Brown in California. Further, I would hold the

admission of that evidence was reversible error as to the sentencing phase of Defendant's trial. Consequently, although I concur in affirming Brown's conviction, I would remand for resentencing.

I. Guilt Phase

In this case, the trial court permitted the California victim, Ms. Schnell, to testify, over objections by defense counsel, regarding the Defendant's violent behavior toward her during the days following the murder of Ms. Washa. Ms. Schnell testified how Brown restrained her with handcuffs and other devices, sexually assaulted her, forced her to write a check to him for $4,000, threatened her with a knife, and slit her throat.

The trial court ruled that Ms. Schnell's testimony was admissible under two exceptions to Evidence Rule (ER) 404, the res gestae exception and the common scheme or plan exception. The court stated the evidence "was relevant to material issues . . . relating to premeditation, intent, and the four [statutory] aggravating factors" and that the "probative value of the testimony . . . substantially outweighed its prejudicial effect." Majority at 573 (referring to the aggravating factors found by the jury pursuant to RCW 10.95.020). The majority agrees.

In my view, the majority and the trial court were wrong in concluding that under ER 404(b) it was proper to admit Ms. Schnell's testimony during the guilt phase of Brown's trial. First, the Schnell testimony is not res gestae evidence. The trial court erred in admitting her testimony under that legal exception to ER 404. Second, ER 404 requires a trial court to balance the probative value against the

prejudicial effect of evidence of other crimes and bad "acts" committed by the defendant. The trial court here correctly acknowledged the very prejudicial nature of the Schnell testimony. The court failed to recognize, however, that ER 404(b) evidence is generally inadmissible and the burden is on the State to establish that evidence of other offenses is not only relevant but "*necessary to prove an essential ingredient of the crime charged.*" (Emphasis added). *State v. Goebel,* 40 Wn.2d 18, 21, 240 P.2d 251 (1952), *overruled on other grounds by State v. Lough,* 125 Wn.2d 847, 860, 889 P.2d 487 (1995); *State v. Saltarelli,* 98 Wn.2d 358, 362, 655 P.2d 697 (1982) (quoting *Goebel,* 40 Wn.2d at 21); *State v. Brown,* 113 Wn.2d 520, 782 P.2d 1013, 80 A.L.R.4th 989 (1989); *State v. Lane,* 125 Wn.2d 825, 831-32, 889 P.2d 929 (1995) (citing *Saltarelli,* 98 Wn.2d 358 and *Goebel,* 40 Wn.2d 18). Because the need for the testimony to prove an essential ingredient of the crimes charged did not overcome the extreme prejudice of that testimony, the admission of Schnell's testimony was error.

A. Res Gestae

Evidence of other misconduct may be admissible under the res gestae exception "[t]o complete the story of *the crime on trial* by placing it in the context of nearby and nearly contemporaneous happenings." 1 MCCORMICK ON EVIDENCE § 190 at 799 (John W. Strong ed., 4th ed. 1992). *See State v. Tharp,* 96 Wn.2d 591, 594, 637 P.2d 961 (1981) (other misconduct admissible "in order that [the jury] have the entire story of what transpired on that particular evening"). In this case, the crimes against Ms. Washa were completed with her death, well before the Defendant's conduct with Ms. Schnell

occurred. Thus, evidence that Defendant raped and cut Ms. Schnell's throat two or three days after the completion of his crimes "on trial" does not constitute res gestae evidence.

In oral argument before this Court the State conceded the same.

Talmadge, J.: You would not be contending that if common plan or scheme were not part of this case that all the details of the crimes that were committed against Ms. Schnell would be at all relevant in terms of res gestae as an exception?

Ms. Pahmeier: That's true.

. . . .

Madsen, J.: Are you conceding that the evidence of the rape and the slashing of the throat would not be relevant if it were offered only for res gestae purposes?

Ms. Pahmeier: Yes, I would say it was definitely admitted under the ER 404(b) common scheme or plan.

. . . .

Ms. Pahmeier: I'm not sure that the evidence of the incidents that took place then in California when he got there would come in except under the court's. . . .

Alexander, J.: So it comes in under common scheme or plan or it doesn't come in at all?

Ms. Pahmeier: That's correct.

Tape of Oral Argument, side 7: 539-570.

Ms. Schnell's testimony does not meet the definition of res gestae evidence and its admission under that exception was erroneous.

B. Necessity of Evidence

To constitute evidence of a common scheme or plan the prior misconduct must be an integral part of a larger or "overarching" scheme or plan. *State v. Lough,* 125 Wn.2d 847, 889 P.2d 487 (1995). Alternatively, the evidence may demonstrate a commonly used scheme or plan. *See id.* at 854-55. The State argues here that Schnell's evidence was admissible under the common scheme or plan exception because his crimes against Ms. Washa were part of his overarching plan to rape, rob, and assault Ms. Schnell. Assuming that the evidence was part of a common scheme or plan, it should, nevertheless, have been excluded because it was not necessary to prove an essential element of the crime charged.

The State says the Schnell evidence was necessary to rebut Defendant's claim that Ms. Washa's murder was an accident or an act of panic, not premeditated murder, and Defendant's claim that the sexual intercourse with Ms. Washa was consensual.

Initially, I find the State's justification for the Schnell evidence disingenuous, considering Defendant never testified and, in fact, offered no defense at all. Most of the evidence against Defendant came from his confession, which Defendant attempted to keep out of evidence. The confession was offered by the State in its case in chief as substantive evidence. Thus, it is the State's own evidence, contained in the confession, which the State is attempting to discredit with Schnell's testimony. The State should not be allowed to offer confession evidence, over defense objection, and then

claim that ER 404 evidence is necessary to rebut Defendant's claim that he lacked premeditation to murder or that sex was consensual. This is particularly true where Defendant has not testified or offered any evidence regarding premeditation, motive, or intent. *See State v. Lavaris*, 106 Wn.2d 340, 346, 721 P.2d 515 (1986) (State may not call witness for primary purpose of impeaching him with otherwise inadmissible testimony).

More importantly, the State's assertions regarding the need for Schnell's testimony are simply not born out by the evidence. Rather than casting doubt on premeditation, Defendant's confession establishes it. In his confession, Defendant stated:

> I realized if I left her there, she could just bang and clang and crunch and scream and be out very quickly. Otherwise, I would have just left her there and that's when I went to the back of the truck and I . . . killed her.

Ex. 89, tape 2, side 1, at 630-650. Moreover, Defendant's discussion of being panicked was in relation to moving the car *after* he had killed her. "I forgot that trunks have like holes and things like that. So I panicked and left that place and drove around. . . ." Ex. 89, tape 1, side 2 at 50-60. Defendant said he killed Ms. Washa because she was a stranger and it made sense for him to kill her. Ex. 89, tape 1, side 1 at 625-635. Clearly, Ms. Schnell's testimony was not necessary on the issue of premeditation.

Nor was the evidence necessary on the issue of consent. He stated in his confession that during intercourse he noticed she was looking at the door and thinking of escape. In response, Brown stated he

decided "to have a little control . . . make her a little more scared of me." Ex. 89, tape 2, side 1. Further, the physical evidence overwhelmingly proved that intercourse was not consensual. *See* Majority at 556.

Finally, it is difficult to see how Defendant's conduct with Ms. Schnell had any bearing on his premeditation in the Washa murder or the consensual nature of his sexual contact with Ms. Washa. Defendant was not charged with premeditation in the Schnell crime, nor was he charged or convicted of sexual assault on Ms. Schnell.

Considering the overwhelmingly strong case for the State based on the physical evidence and Defendant's confession, it is clear that the real reason the State offered Schnell's testimony was to demonstrate the Defendant's propensity to rape, rob, and slash women's throats. The State candidly stated the "exclusion of Schnell's testimony would not have changed the outcome of this case." Br. of Resp't at 109. The State thus concedes the evidence was not necessary.

> In the present case, the exclusion of Schnell's testimony would not have changed the outcome of this case. The remaining evidence, including Brown's confession, is overwhelming. The heinous acts the defendant committed upon Washa were far more compelling than the streamlined testimony from Schnell concerning what the defendant did to her.

Br. of Resp't at 109.

C. Prejudice

The Schnell evidence also fails the second part of the admissibility test; i.e., the probative value of the evidence must outweigh its prejudicial effect. Even assuming Schnell's testimony was admissible under the common scheme or plan exception to ER 404, her testimony was, at best, cumulative and of marginal probative value. *See DeVore v. United States,* 368 F.2d 396, 398 (9th Cir.1966) (evidence of other bad acts deemed improperly admitted because, in view of the cumulative nature of the evidence, the "prejudice to appellants was not balanced by any substantial gain to the government's case"). More importantly, the Schnell evidence was obviously "dragged in" for its prejudicial effect and the emotional response it would evoke. *Carson v. Fine,* 123 Wn.2d 206, 224-25, 867 P.2d 610 (1994). The prosecution was adding frosting to the cake.

D. Harmless Error

The State's case, including the Defendant's confession and the physical evidence, was overwhelming. Thus, while admission of Schnell's testimony was error, it was harmless as to the guilt phase of this trial. It was not, however, harmless as to the penalty phase.

II. Penalty Phase

Unlike the guilt phase, admission of the Schnell testimony is reversible error as to the penalty phase of this capital case. The majority and the trial court fail to recognize that the balancing of the potentially undue prejudicial effect of Ms. Schnell's testimony against its probative value cannot be limited only to issues relevant to the guilt phase of this trial. A jury in a capital crime trial deliberates on an entirely separate question during

the sentencing phase. Therefore, in deciding whether to admit evidence in the guilt phase of a capital trial, the trial court must weigh the effect of such potentially prejudicial evidence against the probative value in the sentencing phase of the trial. Because any probative value of Ms. Schnell's testimony was far outweighed by its prejudicial impact during the penalty phase, admission of such testimony during the guilt phase of the trial was an abuse of discretion.

The decision to admit evidence of other crimes, wrongs, or acts "lies largely within the sound discretion of the trial court" and "will not be reversed on appeal absent a showing of abuse of discretion." *State v. Laureano,* 101 Wn.2d 745, 764, 682 P.2d 889 (1984). However, a review of the evidentiary decision at issue here is also influenced by the fact that the evidence that was admitted had the potential to affect the imposition of the death penalty, which this Court recognizes "qualitatively differs from all other punishments." *State v. Lord,* 117 Wn.2d 829, 888, 822 P.2d 177 (1991), *cert. denied,* 506 U.S. 856 (1992). Because of this qualitative difference, review of a claimed error associated with the sentencing phase of a capital case must receive a more careful review of the record to assure that "there [is] reliability in the determination that death is the appropriate punishment." *Id. See also Kwan Fai Mak v. Blodgett,* 754 F. Supp. 1490, 1493-94 (W.D. Wash. 1991) ("The Constitution requires the most careful scrutiny of every case in which a person has been sentenced to death."), *aff'd,* 970 F.2d 614 (9th cir. 1992), cert. *denied,* 507 U.S. 951 (1993).

A careful review of the record of this case indicates that the State properly notified the

Defendant of the State's intent to seek the death penalty, and that each member of the jury was questioned at voir dire about his or her views with respect to the death penalty. It is, therefore, beyond debate that the parties, as well as the trial judge, were well aware that a special sentencing proceeding, as provided by RCW 10.95.020-.070, would be required if the jury found Brown guilty as charged of aggravated first degree murder. We must also assume that the trial judge was aware that it "is well settled that all evidence which is admissible in the guilt phase [of a capital case] is also admissible in the penalty phase." *In re Lord,* 123 Wn.2d 296, 322, 868 P.2d 835, *cert. denied,* 513 U.S. 849 (1994) (citing *State v. Bartholomew,* 101 Wn.2d 631, 643, 683 P.2d 1079 (1984) and *State v. Mak,* 105 Wn.2d 692, 720-21, 718 P.2d 407, *cert. denied,* 479 U.S. 995 (1986), *sentence vacated on writ of habeas corpus sub nom. Mak v. Blodgett,* 754 F. Supp. 1490 (W.D. Wash 1991), *aff'd,* 970 F.2d 614 (9th Cir. 1992), *cert. denied,* 507 U.S. 951 (1993)).

During the penalty phase, the essential question that the jury must answer is whether it is "convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency." RCW 10.95.060(4). In order to assure that the special sentencing proceeding in a capital case comports with "state and federal constitutional standards," the Court has specifically held that the province of the jury in such proceedings "must be *limited* to mitigating evidence . . . and mitigating factors only." *Bartholomew,* 101 Wn.2d at 642 (emphasis added). As we stated in *Bartholomew,* "in most cases the prosecution may open only with the defendant's criminal record and evidence which

would have been admissible at the guilt phase of the trial." *Bartholomew,* 101 Wn.2d at 643. Therefore, the State acted properly in this case when it sought to admit evidence that Brown has a criminal record of prior convictions. However, because the "introduction of a certified copy of the judgment and sentence is the preferred way to introduce a prior conviction when it is admissible," Ms. Schnell's detailed testimony would not have been admissible at the penalty phase unless it would have been admissible at the guilt phase, or offered in specific rebuttal to a mitigating factor raised by the Defendant. *State v. Gentry,* 125 Wn.2d 570, 638, 888 P.2d 1105, *cert. denied,* 516 U.S. 843 (1995). As explained above, the evidence was not admissible during the guilt phase.

Looking to the penalty phase, it is indisputable that Ms. Schnell's testimony is probative on the question of whether leniency is warranted. However, one of the reasons, if not the primary reason, such evidence is probative is because of its highly prejudicial nature. It is precisely for this reason that it is generally a violation of the Defendant's due process rights for the jury to even consider such evidence, unless it is relevant to rebut a mitigating factor that has been first raised by the Defendant. *Lord,* 117 Wn.2d at 890 ("[W]hen the defendant presents evidence of mitigating circumstances, the prosecution is not restricted to the record of convictions. The State is entitled to . . . introduce relevant evidence to rebut defendant's evidence so that the jury receives a balanced and complete picture.") This is why this Court has ruled that although the State may, in the opening of the special sentencing proceeding, provide

the jury with certified copies of judgments and sentences concerning defendant's prior convictions, it may not present additional evidence relating to those crimes unless such evidence relates to mitigating evidence or factors raised by the defendant. *See Bartholomew,* 101 Wn.2d at 642.

With respect to the question of whether leniency is warranted, Ms. Schnell's account of Brown's violent acts constituting sexual assault and rape, offenses Brown *was neither charged with nor convicted of,* posed a significant danger of being unfairly prejudicial. *See, e.g., State v. Bowen,* 48 Wn. App. 187, 738 P.2d 316 (1987); *State v. Ramirez,* 46 Wn. App. 223, 730 P.2d 98 (1986); *State v. Harris,* 36 Wn. App. 746, 677 P.2d 202 (1984) (admission of such evidence was reversed because of prejudicial effect on a jury's deliberation of a defendant's guilt or innocence). The trial court should have considered the potential prejudice in the penalty phase when deciding in the guilt phase whether to admit the evidence.

The Supreme Court of New Jersey expressed similar concerns about the impact of guilt phase evidence on the jury's penalty determination in a capital case. *State v. Erazo,* 126 N.J. 112, 594 A.2d 232 (1991). The court said "[w]hen the same jury hears both phases of such a case, evidence admitted on the guilt phase may sometimes taint the penalty phase. With the stakes so high, the possibility of prejudice on the penalty phase persists as a cause for continuing concern." *Id.* at 242.

Upon properly considering the prejudicial impact of the evidence in the penalty phase, the conclusion is unavoidable that the evidence was so

overwhelmingly prejudicial to the jury's sentencing determination that it should not have been admitted. While admission may have been harmless as to the guilt phase, the same cannot be said when the jury's subjective determination of life or death was at issue.

In sum, the nature of the ER 404(b) evidence in this case was so inflammatory that the trial court's failure to balance the probative value of the evidence against the prejudicial impact as it relates to the penalty phase inquiry constitutes an abuse of discretion, for it cannot be said that there is reliability in the determination that death is the appropriate punishment. *Lord,* 117 Wn.2d at 888. ("Because the death penalty qualitatively differs from all other punishments, there must be reliability in the determination that death is the appropriate punishment.")

To be assured of such reliability, I would remand for a new sentencing proceeding where Ms. Schnell's testimony is not presented to a new jury impaneled to determine Defendant's sentence.

ALEXANDER and SANDERS, JJ., concur with MADSEN, J.

Reconsideration denied September 23, 1997.

FILED

May 20, 1994

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,	)
Plaintiff,	) No. 91-1-03233-1
v.	) COA 61320-6
CAL COBURN BROWN,	) RP-24
Defendant.	)

BEFORE THE HONORABLE RICARDO S. MARTINEZ

NOVEMBER 3, 1993

KING COUNTY COURTHOUSE

SEATTLE, WASHINGTON

APPEARANCES

ALFRED W. MATHEWS, Deputy Prosecuting Attorney, appearing on behalf of the Plaintiff.

THERESA FRICKE, Deputy Prosecuting Attorney, appearing on behalf of the Plaintiff.

LIN-MARIE HUPP, Attorney at Law, appearing on behalf of the Defendant.

TERRY L. MULLIGAN, Attorney at law, appearing on behalf of the Defendant.

KERN W. CLEVEN, Attorney at law, appearing on behalf of the Defendant.

THE COURT: That's fine, Mr. Deal. Good afternoon.

MR. DEAL: Good afternoon.

THE COURT: Do you have any questions at all about any of the preliminary instructions that you got this afternoon and the format that we were talking about or the reasons why the attorneys have to discuss the penalty phase when there may never really be a penalty phase.

MR. DEAL: No, I think I understand the situation.

THE COURT: Did you answer or nod your head about remembering something about having heard this crime before?

MR. DEAL: No, I did not.

THE COURT: Okay. We'll start with the defense.

MS. HUPP: Thank you, your Honor.

VOIR DIRE EXAMINATION

BY MS. HUPP:

Q Good afternoon. My name is Lin-Marie Hupp, and I'm one of Cal Brown's attorneys.

I would like to start off asking you some questions about your feelings about the death penalty. I want to reinforce what the Judge has already told you, which is there are no right or wrong answers. We just need to get information about your feelings so we can do our job.

A Okay.

Q Can you tell me when it was you first realized this was a potential death penalty case?

A Not until last Monday when I was here in the initial jury information session.

Q Okay. Can you tell me when the Judge read that long thing to you and basically told you that this was a potential in the case, can you tell me what you were thinking when you heard that?

A I guess I wasn't surprised when I got the announcement for jury duty. And it was more than the standard two weeks that most everybody else goes to. I thought it must be a pretty substantial case. In my mind I tried to guess what it might e, so this is one of the things that entered into it.

Q Can you give me an idea of what your general feelings about the death penalty are?

A I do believe in the death penalty in severe situations. A good example might be the young man from, I believe he was from Renton that killed a couple of boys down in the Vancouver area and was sentenced to the death penalty, and wanted the death penalty. And I think it is appropriate in severe cases.

Q And that case you're talking about, that is the one where he actually came out, the defendants actually came out and

said that he actually wanted to die?

A I believe that was the case.

Q Does that have any kind of bearing on your idea that the death penalty was appropriate in his case?

A I believe that it was in that case.

Q If you removed that factor completely from it, is that again the type of case that you think the death penalty would be appropriate?

A It would have to be a severe case. I guess I can't put a real line where that might be, but there are a lot of cases that I don't think it's where people would - -

Q Okay. And let me kind of fill in the blanks for myself here by just asking you a couple of questions about that. I'm assuming that there would not be any case other than murder that you would think the death penalty would be appropriate?

A I think that is correct.

Q Okay. And the way the law is in Washington anyway, in order to get to the point where you would even consider the death penalty, the State would first have to prove that you had committed a premeditate murder and one that had been thought about beforehand.

Do you have any kind of feeling that

something other than a premeditated murder, in other words, one that would have been planned that would be appropriate for the death penalty?

A No. I think it would have to be premeditated.

Q In addition to that in Washington even premeditated murders are not eligible for a potential death penalty unless the State also proves aggravating circumstances. In this case the State is alleging or is going to try and prove a number of aggravating circumstances, four of them. Okay. And the ones that they are going to try and prove are that the murder was committed, a premeditated murder was committed during a rape, a robbery, a kidnapping and that it was done in order to conceal a witness or eliminate a witness.

Does that fall within the class of cases that you think the death penalty is appropriate?

A I think that would be.

Q Okay. Now, how about other sentencing options in a case like that, do you think that something other than the death penalty might be an appropriate sentence?

A I think that if a person is temporarily insane or things of that that lead a person to do things that they would not normally do, I think that would enter

into it.

Q All right. Other than - - well, maybe what we should do - - the way that the law is in Washington, if the jury finds beyond a reasonable doubt that somebody has committed a premeditated murder with at least one aggravating circumstance, and in this case you have a potential for the four, then the jury reconvenes to consider whether or not the death penalty should be imposed or whether or not a life sentence without parole should be imposed.

One sort of aside here, life without parole is exactly what is sounds like. It is a life sentence. You're not ever eligible for parole. You hear about it in the papers sometimes where somebody has got a life sentence and they're going to be eligible for parole in 10 years or 20 years.

A I understand.

Q Were you aware before that Washington has got this kind of sentence where it's life without parole where you are not ever eligible for parole?

A I did not until this afternoon.

Q That is the two options that the jury has if they found the person guilty of premeditated murder beyond a reasonable doubt plus aggravating circumstances beyond a reasonable

doubt.

Do you think that you could consider both options?

A Yes, I could.

Q Could you give me an idea sort of have you thought about sort of the underlying reason why you think the death penalty is appropriate, what purpose it serves, that kind of thing?

A I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate.

Q Okay. Now, knowing that you didn't know before when you were coming to those opinions about the two options that we have here obviously somebody who is not going to get out of jail no matter which sentence you give them if you got to that point of making a decision about the sentence, does that mean what I'm hearing you say is that you could consider either alternative?

A I believe so, yes.

Q Now, in your, I think in your questionnaire you sort of referred to that also, what you kind of thought about was if somebody had been killed and it had been proven to you that they would kill again. Understanding that the two options there are life without parole or the death penalty, there is not a lot of likelihood that people are going

to spend a lot of time talking about whether or not they're going to kill again in the sentencing phase of this case. Is that going to make you frustrated? Are you going to want to hear about things like that, about people's opinions in the penalty phase?

A I'm not sure.

Q Okay. That's very fair. Do you have any kind of feelings about the frequency of the use of the death penalty in the United States today? Do you think it's used too frequently or not often enough?

A It seemed like there were several years when it wasn't used at all and just recently it has become more prevalent in the news anyway. I don't think it should never happen, and I don't think it should happen 10 times a week either. I'm not sure what the appropriate number is but I think in severe situations, it is appropriate.

Q It sounds like you're a little more comfortable that it is being used some of the time?

A Yes.

Q You weren't happy with the time when it wasn't being used at all?

A I can't say I was happy or unhappy, I just felt that there were times when it would be appropriate.

Q Let me ask you, and we may have

covered this already, but let me ask you just to make sure I understand. If the State were to prove beyond a reasonable doubt that the defendant had committed a premeditated murder with aggravating circumstances that I have laid out for you, rape, robbery, kidnapping, to conceal or eliminate a witness, at least one of those, in addition another thing you might hear in this trial is some evidence that the defendant deliberately inflicted pain upon the victim before she died for some period of time.

If that was the crime that you heard about and came to a decision about guilty about, do you think you consider a life sentence?

A I could consider it but I don't know if I really have enough information to make a determination.

Q Right. And it's real tough to be asking you these questions and even tougher for you to have to answer them without any evidence before you. But you understand that this is our only time to do that before you have heard all the evidence?

A I understand, yes.

Q As a matter of fact, the law in this state after, even after you have found somebody guilty of really hideous crime like that presumes that the sentence, the appropriate sentence is life without

parole. The State has the burden of proof, again, in the penalty phase. And they would have to prove beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit a life sentence.

Are you comfortable with that idea that you start off presuming that, as a matter of fact, even for a hideous crime that a life sentence is the appropriate sentence?

A It is or is not?

Q That it is an appropriate sentence.

A I guess I'm a little confused by the question. So, you go into it with a life sentence is the appropriate sentence?

Q Right. If you look at the chart here, there's almost a mirror image to start off a trial presuming that somebody is innocent and you start off a sentencing presuming that a life sentence is appropriate?

A I see.

Q Okay.

A Yes.

Q Okay. Now, as far as mitigating circumstances, you had mentioned the idea that maybe somebody was temporarily insane. The Judge is going to give you an instruction on mitigating circumstances, and I will defines it for you, but the definition is real broad.

The definition basically is, any reason, not a justification, not an excuse for the crime and not a defense to the crime, but a reason for imposing something other than death. That's pretty broad.

MR. MATTHEWS: I object to that question. I don't believe that is a question. I believe that's a statement.

THE COURT: The objection will be sustained.

Q (BY MS. HUPP) The judge will instruct you about what a mitigating circumstance is.

But what I want to be real clear about is that it's not a defense to the crime. Okay. In other words, if you believe that somebody was really temporarily insane at the time he committed the offense, well, then it wouldn't be premeditated. It would be an insanity defense, and that would all get dealt with - -

MR. MATTHEWS: Your Honor, again, I am going to object to the nature of the question.

THE COURT: Mr. Deal, you were the one that actually brought it up in terms of the mental status of the person. You are the one who said temporarily insane when they committed this kind of crime. You realize that there are particular defenses that may be available in the

actual criminal case itself, the guilt phase.

But once you get to the penalty phase, we're not taking about the crime in any way, and you're simply trying to determine what the appropriate punishment or sanction should be for a crime that a person has been found guilty of. At that point in time, something like all sorts of mitigating circumstances come into it, and mental status can come into it. But it would only be evaluated in the light of the mitigating circumstances, not a defense. Do you understand that?

A Understand.

Q (BY MS. HUPP) To just sort of follow up on that, if mental status came into play and you were presented with some sort of evidence about mental status, is that the sort of evidence you would consider?

A Yes, I could.

Q How about things like somebody's childhood or their emotional development?

A I could consider it. I don't have strong feelings one way or the other.

Q Okay. All right. And, also, when we talk about mitigating circumstances, what might be mitigating to you might not matter much to the person sitting next to you in juror's box. Do you think

you could discuss your feelings about those things?

A Yes.

Q Could you, say the person next to you says something is mitigating and you don't think it's very mitigating at all, could you also discuss it in this situation?

A (Nodding head).

Q Could you respect that other person's opinion?

A Everybody is entitled to an opinion, yes.

Q Another thing that happens at the sentencing phase of the trial is that the jury would have to be unanimous, in other words, everybody would have to agree if they were going to impose a death sentence. If one person, four people, five people, how ever many people don't agree with that, then the sentence is life. Okay. So, it kind of strips away that sort of comfort in numbers that some people get from the idea of having a unanimous decision.

Do you think you can accept the responsibility for such an important decision for yourself?

A I do.

Q Okay. Thank you.

MS. HUPP: I have no further questions.

THE COURT: The State.

VOIR DIRE EXAMINATION

BY MR. MATTHEWS:

Q Mr. Deal, I'm Al Matthews. I'm one of two prosecutors in the case. I have got some very specific questions, and perhaps we can clear them up real rapidly.

I see your step-brother is a policeman and you see him about four times a year.

A (Nodding head).

Q Do you ever have any discussion about the death penalty, is this a subject that ever comes up?

A No.

Q Have you ever had occasion to discuss it at all within the family circle?

A I don't believe so.

Q You mentioned on your questionnaire, and we do read them, that you're in favor of the death penalty if it is proved beyond a shadow of a doubt if a person has killed and would kill again. Do you remember making that statement?

A Yes.

Q First of all, have you ever been on a jury trial before?

A I have not.

Q Now, you made this statement before

you read your juror's handbook I imagine?

A Yes.

Q So, I want to ask you, the thing that bothers me, of course, is the idea beyond a shadow of a doubt. The law says beyond a reasonable doubt, and it will be explained to you what it actually means. But I want to assure you it doesn't mean, I don't believe the Court would instruct would you it means beyond all doubt or beyond any shadow of a doubt. Knowing that, would you still require the State to prove beyond a shadow of a doubt that the crime occurred knowing that the law doesn't require that much of us?

A I would have to know the, I'm at a loss for the words here.

Q You can ask me any questions, too, if you need some clarification.

A I guess it would have to be in my mind very obvious that the person would reoffend.

Q Well, we're not talking about that, sir.

A Or was guilty, yes.

Q So, we're talking about that?

A Yes.

Q So, you would be satisfied with a reasonable doubt standard? You would be willing to follow the law?

A Yes.

Q In other words, nothing, there is very few things in life absolutely certain?

A I understand.

Q And that is basically what we're saying to you, and that is what the term reasonable doubt means - -

A (Nodding head).

Q - - that we don't have to prove it beyond all doubt.

Now, we get to the penalty phase and the question becomes slightly different. It presumes life as a person is presumed innocent in the guilt phase, it is presumed that the proper penalty for the beginning point in the penalty phase is life in prison without parole.

Now, you mentioned that you would have to be satisfied that the person would not kill again. Now, you know that the possible, that the only two penalties are life in prison without parole or death. The person, if he is committed, if he is convicted of aggravated murder, is not going to be out on the streets again, not going to come in contact with the people that he had a chance to run into before. So, the likelihood of him killing someone out in the street is nil or practically nil at that point.

I guess the reverse side of what you're

saying is, if you could be convinced that he wouldn't kill again, would you find it difficult to vote for the death penalty given a situation where he couldn't kill again?

A I think I made that statement more under assumption that a person could be paroled. And it wasn't until today that I became aware that we had a life without parole in the state of Washington.

Q And now that you know there is such a thing and they do mean what they say, can you think of a time when you would be willing to impose a death penalty since the person would be locked up for the rest of his life?

A I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole.

Q And I realize this is put on you rather suddenly, but you also recognize as someone who is representing the State in this case, we have made the election to ask that the jury if he is found guilty, ask that the jury vote for the death penalty.

And I'm asking you a very important thing and to everyone in here, whether you, knowing that the person would never get out for the rest of his life, two things. And they're slightly different. One, whether you could consider the

death penalty and the second thing I would ask you is whether you could impose the death penalty. I'm not asking a promise or anything.

But I'm asking you, first, could you consider it, and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?

A Yes, sir.

Q So, this idea of him having to kill again to deserve the death penalty is something that you are not firm on, you don't feel that now?

A I do feel that way if parole is an option, without parole as an option. I believe in the death penalty. Like I said, I'm not sure that there should be a waiting line of people happening every day or every week even, but I think in severe situations it's an appropriate measure.

Q But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?

A I could consider it, yes.

Q Then could you impose it?

A I could if I was convinced that was the appropriate measure.

MR. MATTHEWS: I have no further questions.

THE COURT: All right. Mr. Deal, there is something that I want to clarify in response to some of the questions that were asked of you.

VOIR DIRE EXAMINATION

BY THE COURT:

Q In your questionnaire it talks about beyond a shadow of a doubt, and the prosecutor here went into that a little further. You realize that that is the standard that the law imposes on the State to prove a case beyond a reasonable doubt. And, obviously, that is a questions of interpretation.

You officiate basketball games. That's in your questionnaire. You, even at the college level, knowing how fast that game is, you have to make a call on some of those calls and you have to decide whether to blow that whistle and make that particular call. Do you think you understand the difference between a reasonable call and beyond a shadow of a doubt type call?

A I guess I do. The terminology beyond a shadow of a doubt, when I wrote that I wasn't even sure whether, I mean, it's just terminology that I have heard probably watching Perry Mason or something over the years. But I guess the point I was making that it has

to be - -

Q You would have to be positive?

A I would have to be positive, that's correct.

Q The State has to convince you?

A Yes.

Q As they would have to convince any reasonable person?

A Yes.

THE COURT: Mr. Deal, let me have you step back into the juryroom. The bailiff will excuse you from there in just a few minutes. Thank you.

Counsel, any challenge to this particular juror?

MR. MATTHEWS: I would, your Honor, not on the term beyond a shadow of a doubt, I think he would certainly stick with the reasonable doubt standard. But I think he is very confused about the statements where he said that if a person can't kill again, in other words, he's locked up for the rest of his life, he said, basically, he could vote for the death penalty if it was proved beyond a shadow of. And I am certainly going to concede that he means beyond a reasonable doubt. And if a person kills and will kill again. And I think he has some real problems with that. He said he hadn't really thought about it. And I don't think at this period of time he's

had an opportunity to think about it, and I don't think he said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again. So, that is my only challenge.

MR. MULLIGAN: We have no objection.

THE COURT: Counsel, the request of the prosecutor's office, we will go ahead and excuse Mr. Deal.